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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of)

GAF BROADCASTING COMPANY)

For Renewal of the License)

MM Docket No. 93-54

File No. BRH-910201WL

GAF is the licensee of award-winning classical music station WNCN(FM), New York, New York. The Guild is a group which claims to represent the interests of certain WNCN listeners. Last year, the Commission rejected the Guild's petition for reconsideration of the 1988 order granting the transfer of control of WNCN.² More recently, the Hearing Designation Order ("HDO") in this proceeding rejected numerous arguments raised by the Guild against the renewal of WNCN.³

Although not a party to this proceeding, the Guild sought the addition of two hearing issues against GAF. It first requested an EEO issue, based on the fact that GAF voluntarily revised certain information concerning its EEO record listed in exhibits to its July 1, 1991 Consolidated Opposition to Petitions to Deny its renewal application. The HDO in this proceeding did not address WNCN's EEO record. Rather, it expressly stated that "[a]ll pleadings, allegations, and agreements" relating to WNCN's EEO record had been referred to the Mass Media Bureau's EEO Branch for disposition, where they remain pending today. The HDO expressly conditioned any grant of GAF's renewal application on the Commission's resolution of all such allegations. 8 FCC Rcd at n.1. In light of the HDO's clear and unambiguous directive that the EEO Branch was to resolve all such allegations, the ALJ properly held that he was without authority to simultaneously consider an EEO issue. Attachment 1 at ¶ 6, citing Anax Broadcasting Inc., 87 FCC 2d 483, 486 (1981).

²GAF Broadcasting Company, Inc., 7 FCC Rcd 3225 (1992), appeal pending, Listeners' Guild, Inc. v. FCC, No. 92-1270 (D.C. Cir. June 25, 1992).

³8 FCC Rcd 1742 (ASD 1993). Indeed, the Guild has been bringing unsuccessful accusations against WNCN for more than 15 years.

The Guild claims that GAF's EEO amendment was filed too soon before the HDO's release to have been specifically considered. As the Presiding Judge correctly recognized, however, the Guild's claim is not only speculative but totally irrelevant. Attachment 1 ¶ 6. The HDO would not have considered the amendment, regardless of whether it was filed 7 days or 7 months prior to its adoption, because the HDO did not review any aspect of or allegations regarding WNCN's EEO record.⁴ The Guild's EEO allegations will be fully considered by the appropriate FCC staff. There is simply no reason for the Presiding Judge to consider the effect of GAF's EEO amendment simultaneously with the EEO Branch.

The Guild's first issue request also failed on the merits, as the Mass Media Bureau concluded in opposing it.⁵ The Guild failed to show a pattern of inaccurate reporting, intent to deceive, or any possible motive for filing false information, then correcting it. The Guild also grossly distorts the nature of this amendment. GAF voluntarily revised exhibits containing employment data for its overall workforce, during a seven year period, to change the job classification of just one employee.

The Guild also sought an issue concerning whether GAF somehow abused the FCC processes by allegedly making unspecified "threats and/or inducements" with respect to the Guild. The Presiding Judge correctly denied this request because the HDO fully considered and rejected these claims, which the Guild made in its Petition to Deny WNCN's renewal.

⁴Clearly, the Bureau intended that this comparative hearing should not be further delayed, more than two years after GAF filed its renewal application, by the backlog at the EEO Branch.

⁵See Mass Media Bureau's April 28, 1993 Opposition To Motion To Enlarge Issues, Attachment 2 hereto, at 3. The Bureau opposed this issue as an unwarranted fishing expedition.

Attachment 1 at ¶ 7, citing Atlantic Broadcasting Co., 5 FCC 2d 717 (1966). The Mass Media Bureau's Opposition recognized this fact as well. Attachment 2 at 4. The Guild was free to seek reconsideration of the HDO's determination, and has done so. Moreover, as the Mass Media Bureau correctly recognized, these allegations did not state a cognizable claim under the FCC rules. Id. Attachment 2 at 4.

The Presiding Judge also properly denied the Guild's intervention request because it failed to justify participation as a full party rather than a public witness, the status usually accorded to listeners wishing to present testimony in a comparative renewal proceeding. First, the Guild may not participate as a matter of right under Section 1.223(a) of the FCC rules because it has not shown a particularized interest which will be adversely affected. None of the numerous hearing issues sought by the Guild in its Petition To Deny or Motion To Enlarge have been designated for hearing. As the Presiding Judge and Mass Media Bureau both recognized, the Guild's status as a petitioner with respect to one pending allegation obviously does not make it a party for purposes of intervening as a matter of right. Attachment 1 at ¶ 2.⁶ Party status under Section 1.223(a) is limited to situations where a petitioner's petition to deny has been granted in the HDO, and relevant basic qualification issues have been designated against the applicant.

Nor did the Judge abuse his discretion by denying the Guild's request to intervene pursuant to Section 1.223(b), because the Guild utterly failed to demonstrate how its participation would assist the Commission in resolving the only designated issue, the choice

⁶See also Mass Media Bureau's Opposition To Petition For Intervention, filed April 28, 1993, Attachment 3 hereto.

between applicants. The Guild claimed to be able to assist in evaluating GAF's character and performance. But no issue has been designated concerning GAF's character. Nor did

Attachment 1

Memorandum Opinion And Order, FCC 93M-360,
ALJ Joseph Chachkin, released June 15, 1993.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-360

REC'D JUN 17 1993

In re Applications of)
)
GAF BROADCASTING COMPANY, INC.) MM DOCKET NO. 93-54
)
)
For Renewal of License)
of Station WNCN(FM))
New York, New York,)
)
)
CLASS ENTERTAINMENT AND)
COMMUNICATIONS, L.P.) File No. BPH-910430ME
)
)
For Construction Permit for a New)
FM Station on 104.3 MHz)
at New York, New York)

MEMORANDUM OPINION AND ORDER

Issued: June 10, 1993

Released: June 15, 1993

1. Under consideration are "Petition For Intervention" filed April 19, 1993 by Listeners' Guild, Inc. (Guild), Mass Media Bureau's Opposition To Petition For Intervention filed April 28, 1993, Opposition To Petition For Intervention filed May 5, 1993 by GAF Broadcasting Company, Inc. (GAF), Consolidated Reply To Oppositions To Petition For Intervention filed by Guild, "Motion For Leave To File Motion Out Of Time" filed May 18, 1993 by Guild, "Motion For Leave To File Consolidated Reply To Oppositions To Petition For Intervention" filed May 18, 1993 by Guild; ¹ "Motion To Enlarge Issues" filed April 19, 1993 by Guild, Mass Media Bureau's Opposition To Motion To Enlarge Issues filed April 28, 1993, Opposition To Motion To Enlarge Issues filed May 4, 1993 by GAF, and Consolidated Reply To Oppositions To Motion To Enlarge Issues filed May 17, 1993 by Guild.

2. Guild seeks to intervene in this proceeding under either Sections 1.223(a) or 1.223(b) of the Commission's Rules. ² Guild argues that it is entitled to intervene as a matter of right to prosecute its petition to deny the renewal of GAF's license. However, Guild's petition to deny has been denied. See Hearing Designation Order (HDO), 8 FCC Rcd 1742 (ASD 1993). Further none of the matters raised by Guild in its petition to deny are at issue in this

¹ Good cause having been shown, Guild's "Motion For Leave To File Motion Out Of Time" (one day late) and its "Motion For Leave To File Consolidated Reply To Oppositions To Petition For Intervention", which are unopposed, are granted.

² Guild's petition includes affidavits from two of its officers. They recite, inter alia, that Guild is a not-for-profit corporation organized in 1974 to represent the interests of listeners in connection with a change of WNCN's classical music format and that Guild's members consist of listeners residing in areas reached by WNCN's signal.

hearing proceeding. Under Rule 1.223(a) as well as Rule 1.223(b), a petitioner seeking intervention must demonstrate an interest in the proceedings sufficient to justify participation as a party. GAF Broadcasting Co., Inc., 55 RR 2d 1639 (1984). In GAF, the Commission emphasized that to establish such an interest members of the listening public must furnish specific factual allegations supporting the contention that a grant (or denial) of the subject application would not serve the public interest. Further, in the absence of a particularized interest in the outcome of a proceeding relevant to petitioners' status as members of the listening public, "a mere institutional interest in the general subject matter of a proceeding does not warrant granting party status." 55 RR 2d at 1644.³ Guild has not shown how its interest will be adversely affected. As noted, its petition to deny has been denied and none of Guild's allegations have been designated for hearing. Therefore, Guild has failed to establish a basis for intervention under Rule 1.223(a). In this connection, contrary to Guild's assertion, the grant of petitioner status to consider Guild's allegations does not make Guild a party in interest to the comparative hearing. Guild's claim that it has been accorded such status finds no support in the HDO. Also, it makes no sense since, as discussed above, none of the issues it requested have been designated for hearing.⁴

3. In the alternative, Guild contends that it should be permitted to intervene pursuant to Section 1.223(b) of the Commission's Rules. In support, Guild argues that for many years it has closely followed and monitored WNCN(FM)'s programming and GAF's management and corporate activities. Additionally, Guild claims many years of involvement in proceedings involving GAF and WNCN(FM). Guild asserts that its knowledge of GAF, acquired over time, would be helpful in assessing GAF's character and the quality of its performance as a licensee, and that allowing it to intervene would bring to the proceeding the viewpoint of the listening audience.

4. Section 1.223(b) of the Commission's Rules provides that, in addition to establishing the petitioners' interest in the proceeding, a petition to intervene "must show how such petitioner's participation will assist the

party witness pursuant to Section 1.225 of the Commission's Rules.⁵ Therefore, Guild's request for discretionary leave to intervene under Rule 1.223(b) is denied.

5. In pursuance of its request for intervention under Rule 1.223(b), Guild has proposed inclusion of issues against GAF. Guild's first requested issue is premised on disclosures made in GAF's February 22, 1993, Amendment to Consolidated Opposition. There, GAF acknowledged and corrected certain errors with respect to its EEO performance that it made in its Consolidated Opposition to Petitions to Deny. Guild now seeks an issue to determine the facts and circumstances concerning the reporting of this data to the Commission. The HDO expressly stated:

All pleadings, allegations, and agreements which relate to WNCN(FM)'s equal employment program and practices have been referred to the Mass Media Bureau's EEO Branch for Commission disposition. Any grant of GAF's renewal application will be conditioned on the Commission's resolution of the EEO allegations.

8 FCC Rcd.

6. The quoted language makes clear that the EEO branch has been given the authority to resolve all allegations against the WNCN renewal stemming from its EEO record and filings. It is self evident that the proposed issue concerns EEO matters which have been specifically delegated to the EEO branch. Guild appears to recognize that fact since it urges that "upon adding this issue, the Presiding Officer should bring all other EEO related issues within the ambit of the hearing, since they are inextricably interwoven." Motion To Enlarge Issues, p. 3. Nevertheless, Guild argues that the Presiding Judge has the authority to add the issue because GAF's EEO amendment was filed too soon before adoption of the HDO to have been specifically considered. Guild's contention as to receipt of the amendment is based solely on speculation and conjecture. More to the point, the date of its receipt is irrelevant since the HDO did not consider any EEO allegations. The HDO intended for the EEO branch to resolve such allegations. In light of this clear and unambiguous directive, the Presiding Judge is without authority to grant the relief sought by Guild. Frank H. Yemm, 39 RR 2d 1657 (1977); Anax Broadcasting Incorporated, 87 FCC 2d 483, 486 (1981). Its request for an EEO issue is, therefore, denied.

7. Guild's second proposed issue is predicated on its contention that the HDO failed to address the argument raised in its Petition to Deny that GAF abused the Commission's processes by threats and inducements in an effort to dissuade Guild from presenting facts and arguments adverse to GAF. Guild's contention that the HDO failed to address its allegations is without merit. Paragraph 33 makes clear that the HDO considered and rejected Guild's arguments. Since the HDO contains a "reasoned analysis" of the matter raised and Guild has submitted no new facts on the subject, the Presiding Judge is without authority

⁵ Guild's petition does not delineate the specific evidence which it wishes to offer pertaining to GAF's past record.

to reconsider a determination made in the HDO. Atlantic Broadcasting Co., 5 FCC 2d 717 (1966). To the extent that Guild is dissatisfied with the HDO's conclusions, that argument is properly made in a petition for reconsideration, which it has filed.⁶

Accordingly, IT IS ORDERED, That the "Motion For Leave To File Motion Out Of Time" and the "Motion For Leave To File Consolidated Reply To Oppositions To Petition For Intervention" filed May 18, 1993 by Listeners' Guild, Inc. ARE GRANTED.

IT IS FURTHER ORDERED, That the "Petition For Intervention" filed April 19, 1993 by Listeners' Guild, Inc. IS DENIED.

IT IS FURTHER ORDERED, That the "Motion To Enlarge Issues" filed April 19, 1993 by Listeners' Guild, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION


Joseph Chachkin
Administrative Law Judge

⁶ Rule 1.229(d) provides that motions to enlarge issues shall contain specific allegations of fact sufficient to support the action requested. Further, such allegations of fact are to be supported by affidavits of persons having personal knowledge thereof. Guild's allegations are entirely unsupported. Assuming, arguendo, Guild's motion was considered on its merits, the lack of factual support for the issues proposed would compel their denial.

Attachment 2

**Mass Media Bureau's Opposition To Motion
To Enlarge Issues, filed April 28, 1993.**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
APR 29 1993

In re Applications of) MM DOCKET NO. 93-54
)
GAF BROADCASTING COMPANY, INC.) File No. BRH-910201WL
)
For Renewal of License of Station)
WNCN(FM) (104.3 MHz), New York,)
New York)
)
CLASS ENTERTAINMENT AND)
COMMUNICATIONS, L.P.) File No. BPH-910430ME
)
THE FIDELIO GROUP, INC.) File No. BPH-910502MQ
)
For a Construction Permit for a)
New FM Station on 104.3 MHz at)
New York, New York)

To: Administrative Law Judge
Joseph Chachkin

MASS MEDIA BUREAU'S OPPOSITION TO MOTION TO ENLARGE ISSUES

- (2) To determine whether GAF Broadcasting Company, Inc. ("GAF"), licensee of WNCN(FM), New York, New York, engaged in activities in its dealings with Listeners' Guild, Inc. that constituted abuse of the Commission's processes by means of threats and/or inducements calculated to avert the filing of information and/or arguments before the Commission that would have

~~reflected unfavorably upon GAF and its qualifications~~

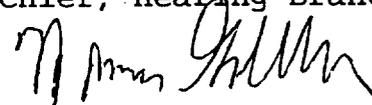
1.229(d) requires that "motions to enlarge contain specific allegations of fact sufficient to support the action requested." Here, Guild has failed to make any prima facie case warranting addition of the requested issue. GAF voluntarily admitted that it erred in its prior submission and Guild has proffered no

discussed its negotiations with GAF regarding changing of the name of the "WNCN Listeners Club." In rejecting the allegations raised in the Petition to Deny, the HDO at paragraph 33 specifically noted that Guild alleged that GAF had abused the Commission's processes with respect to its listener organization. Thus, Guild's contention that the HDO failed to address its allegations is totally without merit. To the extent that Guild suggests that the HDO's exposition of its allegations was inadequate, the Bureau submits that it has reviewed the abuse of process allegations in Guild's Petition to Deny and Petition for Reconsideration and concludes that the requested issue is not warranted. Basically, what Guild is arguing is that GAF was a hard bargainer and did not perform in accordance with the

8. In summary, the Bureau opposes addition of both of Guild's requested issues.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau


Charles E. Dziejcz
Chief, Hearing Branch


Norman Goldstein


Gary P. Schonman
Attorneys
Mass Media Bureau

Federal Communications Commission
2025 M Street, N.W., Suite 7212
Washington, D.C. 20554
(202) 632-6402

April 28, 1993

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch,
Mass Media Bureau, certify that I have, on this 28th day of April
1993, sent by First Class mail, U.S. Government frank, copies of
the foregoing "Mass Media Bureau's Opposition Motion to Enlarge
Issues" to:

Harry F. Cole, Esq.
Bechtel & Cole
1901 J. Street N.W.

Attachment 3

**Mass Media Bureau's Opposition To
Petition For Intervention, filed April 28, 1993.**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	MM DOCKET NO. 93-54
)	
GAF BROADCASTING COMPANY, INC.)	File No. BRH-910201WL
)	
For Renewal of License of Station)	
WNCN(FM) (104.3 MHz), New York,)	
New York)	
)	
CLASS ENTERTAINMENT AND)	
COMMUNICATIONS, L.P.)	File No. BPH-910430ME
)	
THE FIDELIO GROUP, INC.)	File No. BPH-910502MQ
)	
For a Construction Permit for a)	
New FM Station on 104.3 MHz at)	
New York, New York)	

To: Administrative Law Judge
Joseph Chachkin

MASS MEDIA BUREAU'S OPPOSITION TO PETITION FOR INTERVENTION

1. On April 19, 1993, Listeners' Guild, Inc. ("Guild") filed a Petition for Intervention ("Petition") in the above captioned proceeding. The Mass Media Bureau submits the following comments in opposition to Guild's Petition.

2. Guild states that it is a non-profit organization whose members reside in areas reached by Station WNCN(FM)'s signal. Guild claims no interest in any of the applicants in the

petition to deny was denied in the Hearing Designation Order, 8 FCC Rcd 1742 (ASD 1993) ("HDO").¹

3. Guild submits that it is a party in interest entitled to intervene pursuant to Section 1.223(a) of the Commission's Rules for the purpose of prosecuting its petition to deny. In support, Guild claims its petition to deny remains pending with respect to those matters which were not fully addressed in the HDO, and that the HDO granted Guild standing as a party in interest.

4. The Bureau disagrees. Initially, the Bureau submits that the HDO did not grant Guild status as a party. Rather, the HDO, at ¶ 30, merely granted Guild standing for the purpose of considering its petition to deny. Moreover, contrary to Guild's contentions, the HDO did fully address all of the allegations raised in Guild's petition to deny. To the extent that the HDO did not resolve the EEO allegations, Guild will have a full opportunity to participate before the EEO Branch. Accordingly, Guild has failed to establish that it has party status.²

¹ The HDO at fn. 1 referred all matters relating to WNCN(FM)'s EEO program to the Mass Media Bureau's EEO Branch for Commission disposition. The HDO conditioned any grant of GAF's renewal application for WNCN(FM) on the Commission's resolution of the EEO allegations. Guild is concurrently seeking reconsideration of the HDO.

² Guild claims that, if the hearing issues are enlarged as sought in its concurrently-filed motion to enlarge issues, its right to intervene is self-evident. However, the Bureau is concurrently filing an opposition to Guild's motion.

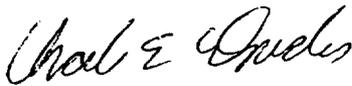
5. In the alternative, Guild states that it is entitled to intervene pursuant to Section 1.223(b) of the Commission's Rules. In support, Guild argues that for many years it has closely followed and monitored WNCN(FM)'s programming and GAF's management and corporate activities. Additionally, Guild claims many years of involvement in proceedings involving GAF and WNCN(FM). Guild asserts that its knowledge of GAF, acquired over time, would be helpful in assessing GAF's character and the quality of its performance as a licensee, and that allowing it to intervene would bring to the proceeding the viewpoint of the listening audience.

6. Section 1.223(b) of the Commission's Rules provides that a petition to intervene "must show how such petitioner's participation will assist the Commission in the determination of the issues in question" In its petition for intervention, Guild failed to demonstrate how it can assist the Commission in the resolution of the designated issues. Guild's proffer is limited solely to its ability to assist in the evaluation of GAF's character and performance. There is, however, no issue in this proceeding as to GAF's character. To the extent that Guild possesses relevant, material and competent information concerning WNCN(FM)'s performance under the "renewal expectancy" aspect of the comparative case, it may offer such evidence as a public

for intervention. GAF Broadcasting Co., Inc., 55 RR 2d 1639
(1984).

7. In light of the foregoing, the Bureau opposes Guild's
petition for intervention.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau


Charles E. Dzedzic
Chief, Hearing Branch


Norman Goldstein


Gary P. Schonman
Attorneys
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April 28, 1993

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certify that I have, on this 28th day of April 1993, sent by First Class mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Opposition to Petition for Intervention" to:

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Counsel for Listeners' Guild, Inc.

Michelle C. Mebane
Michelle C. Mebane

CERTIFICATE OF SERVICE

I, Eve J. Lehman, a secretary at the law firm Fleischman and Walsh, hereby certify that I have this 2nd day of July, 1993 placed a copy of the foregoing "Opposition To Appeal Of Listeners' Guild, Inc." in U.S. First Class Mail, addressed to the following:

*Administrative Law Judge
Joseph Chachkin
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* By hand