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Before the
Federal Communications Commission
Washington, D.C. 20554

AUG 13 3 22 PM '93

MM Docket No. 93-54

DISPATCHED BY

In Re Applications of

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

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1933; Released: August 16, 1993

By the Commission:

1. On March 15, 1993, the Mass Media Bureau's Audio Services Division (the Division) released a Hearing Designation Order (HDO) in the above captioned proceeding. Now before the Commission are a Motion for Deferral of Procedural Dates filed April 12, 1993, by The Fidelio Group, Inc. (Fidelio) and a Petition for Reconsideration filed April 14, 1993 by Listeners' Guild, Inc. (Guild).[1] In addition, GAF and Class Entertainment and Communications, L.P. (Class) filed a Joint Request for Dismissal of Court Appeal (Joint Request), a Joint Motion for Approval of Agreement for Dismissal of Applicant (Joint Motion), and a Joint Motion to Stay Proceeding Pending Action on Settlement Agreement (Stay Request) on June 15, 1993, June 23, 1993 and June 23, 1993, respectively.[2]

2. For the reasons discussed below, we will dismiss Fidelio's motion, deny Guild's petition, grant GAF and Class's Joint Request, deny their Joint Motion and dismiss their Stay Request. Consistent with these actions, we will also address a matter of concern raised by the Bureau's referral of all pleadings, allegations, and agreements which relate to WNCN(FM)'s equal employment opportunity program and practices to the Bureau's EEO Branch for disposition.

I. MOTION FOR DEFERRAL OF PROCEDURAL DATES

3. Fidelio requests a deferral of all procedural dates pertaining to the hearing because there are matters pending before the Court of Appeals and the EEO Branch that "could likely have a serious impact on the resolution of the comparative case."[3] GAF argues, however, that Fidelio's motion is now moot and should be dismissed because the ALJ dismissed Fidelio's application for failure to prosecute, *GAF Broadcasting Company, Inc.*, FCC 93M-295, released May 21, 1993, and there has been no appeal of that order. Because Fidelio is no longer a party to this proceeding, we will dismiss its motion as moot.

II. PETITION FOR RECONSIDERATION

4. Guild argues that the HDO erred by (1) excluding the EEO issue from the hearing, (2) by mischaracterizing some of Guild's arguments and failing to consider others and (3) by not naming Guild as a party to the hearing proceeding.[4] We disagree. Guild contends that the Division's action referring the EEO allegations to the EEO Branch and conditioning any grant of GAF's renewal application on the resolution of the EEO allegations is "a prejudgment of the central question of whether those allegations would

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[1] The following additional pleadings were filed: (a) a Motion to Dismiss filed April 16, 1993, by the Mass Media Bureau (MMB); (b) an Opposition filed April 20, 1993, by GAF Broadcasting Company, Inc. (GAF); (c) an Opposition filed April 28, 1993, by MMB; (d) an Opposition filed April 29, 1993, by GAF; (e) Comments filed May 6, 1993, by Guild; (f) a Consolidated Opposition filed May 17, 1993, by Guild; and (g) a Request for Dismissal of Motion for Deferral filed June 21, 1993 by GAF.

[2] As to the Joint Request, Joint Motion and Stay Request, the Mass Media Bureau (Bureau) filed consolidated comments on July 6, 1993, and GAF and Class filed a joint reply on July 15, 1993. In addition, GAF filed a request for expedited action on August 2, 1993.

[3] In the case before the Court of Appeals, appellants argue that the Commission, in reviewing GAF's transfer of control application seeking approval of a corporate reorganization, erred by refusing to address questions concerning GAF's qualifications to be a licensee because of alleged securities law violations and related wrongdoings by its former parent corporation and a former officer and director. *Shareholders of GAF Corporation*, 7 FCC Rcd 3225 (1992), appeal pending *sub nom. Class Entertainment and Communications, L.P. v. FCC*, No. 92-1269, U.S. Court of Appeals, D.C. Circuit. The HDO in this proceeding referred all allegations of EEO violations to the EEO Branch for disposition. *GAF Broadcasting Company, Inc.*, 8 FCC Rcd 1742, NOTE to n.1 (1993).

[4] Guild's petition requests that all of the issues alleged in its petition to deny GAF's renewal application be designated for hearing. To the extent that that request refers to matters not specifically raised and argued in the instant petition, no showing warranting such relief has been made and Guild's request is thus entitled to no further consideration. See 47 C.F.R. § 1.106(d).

warrant denial of the renewal application," and thus denies Guild its statutory right to a hearing on its EEO-related allegations under 47 U.S.C. § 309(e).[5]

5. We disagree with Guild's interpretation of the Division's action. The Mass Media Bureau regularly submits allegations of EEO misconduct to its EEO Branch to determine whether there have been any violations of the Commission's Rules. The Division separated the EEO matters from the hearing to allow the hearing to proceed expeditiously. To this point, the EEO Branch has not acted on the matters before it and, thus, there has been no determination regarding the allegations. Pursuant to the clear intent of the HDO, as soon as the EEO Branch concludes its analysis of WNCN(FM)'S EEO program and practices, we are directing the Bureau, a party herein, to file a pleading with the ALJ reporting the EEO Branch's findings and recommendations. At that time the parties and Guild may file pleadings in response to that submission. Thereafter, the ALJ should determine what consideration, if any, is to be given to the EEO allegations in this proceeding. If a basic qualifying issue is specified against GAF based on Guild's allegations, Guild would, of course, be entitled to status as a party in this proceeding. See also paragraphs 19 to 21 herein. Finally, if it is determined that no substantial and material question of fact has been raised concerning GAF's EEO program and practices, Guild would still have any appeal rights to which it would be entitled by virtue of its filing a petition to deny GAF's renewal application. See *GAF Broadcasting Company, Inc.*, 8 FCC Rcd at 1747 ¶ 46. Thus, the Division's action of referring the EEO allegations to the EEO Branch for consideration was not improper and has not deprived Guild of any rights, including those it might claim under 47 U.S.C. § 309(e).

6. Guild's argument that the HDO mischaracterized and failed to address crucial allegations of licensee misconduct that reflect adversely on GAF's fitness to be a licensee is also without merit. Guild argues that GAF has consistently used improper threats and inducements in an effort to dissuade Guild from presenting facts and arguments adverse to GAF to the Commission. Specifically, Guild argues that GAF's use of the name "WNCN Listeners' Club" for the station's promotional organization in such a way as to be confusing with Guild's own name was done deliberately and with the sole purpose of putting pressure on Guild to withdraw its complaints about WNCN. However, Guild contends that, rather than focusing on this alleged pattern of abuse of the Commission's processes, the Division misconstrued its argument as merely an attempt to resolve property rights in the name of a promotional organization that is confusingly similar to Guild's own name. Although the HDO notes that the Commission does not adjudicate intangible property rights, it also states, "Guild's accusation, that GAF has somehow abused the Commission's processes on the basis of the name that GAF has given to its listener organization, is totally unsupported and frivolous." *GAF Broadcasting Company, Inc.*, at 1746 ¶ 33. It is thus apparent that the Division did consider Guild's abuse of process arguments and rejected them. Guild provides no information in its petition to warrant further review of this matter.

7. Guild also argues that the HDO did not address the propriety of GAF's insistence on maintaining the terms of a confidentiality agreement between GAF and Guild relating to what Guild describes as non-proprietary information it wishes to bring to the Commission's attention. While this contention was not specifically addressed in the HDO, Guild's petition provides no information to enable the Commission to determine whether the terms of this agreement have any relevance to this proceeding. Therefore, based on the record before us, Guild has failed to demonstrate any reason for futher inquiry in this respect.

8. Finally, Guild has offered no basis for reconsidering the Division's failure to name it as a party to this proceeding. Guild's participation is premised on the specification of issues against GAF which Guild raised in a petition to deny the WNCN(FM) renewal application. Because the matters raised in the petition to deny were either rejected or referred to the EEO Branch for consideration, there is no justification, at this time, for making Guild a party to this proceeding. In light of the above, we will deny Guild's Petition for Reconsideration.

III. DISMISSAL OF COURT APPEAL

9. In an earlier order, the Commission denied various petitions and objections filed by Class and others against GAF's transfer of control application proposing a corporate reorganization. *Shareholders of GAF Corporation*, 7 FCC Rcd 3225 (1992). Class appealed that decision to the United States Court of Appeals for the District of Columbia Circuit, (No. 92-1269). Before us now is a joint request filed by GAF and Class to approve an agreement entered into by the parties in which Class agrees to dismiss its court appeal and withdraw its pending EEO related objections and comments in return for GAF's promise to pay Class $40,000.

10. Section 73.3588 of the Commission's Rules, 47 C.F.R. § 73.3588, provides for dismissal of petitions to deny or withdrawal of informal objections in exchange for financial consideration that does not exceed the legitimate and prudent expenses incurred by the dismissing/withdrawing party. Declarations are attached to the agreement demonstrating that GAF's payment is less than the legitimate and prudent expenses incurred by Class in preparing, filing, and prosecuting its appeal, petitions and objections in the applicable proceedings. Moreover, the Bureau has reviewed the settlement agreement and is satisfied that it meets the requirements of Section 73.3588 and is otherwise in the public interest. Based on the foregoing, we will grant the joint request and approve the Agreement for Dismissal of Court Appeal attached thereto.[6]

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[5] Section 309 states, in pertinent part, as follows:

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally.

[6] The Bureau's support of this agreement is based "on the absence of any demonstrated linkage between disposition of the settlement agreement seeking dismissal of the Class appeal and

IV. DISMISSAL OF CLASS APPLICATION

11. In their Joint Motion for Approval of Agreement for Dismissal of Applicant, GAF and Class request (1) approval of their settlement agreement in which GAF promises to pay Class $40,000 in exchange for the dismissal of its application; (2) dismissal of Class' application and (3) grant of GAF's renewal application. GAF and Class state that they have filed their joint motion with the Commission, instead of the ALJ, because, this proceeding not yet having reached the Initial Decision stage, approval of their motion would require a waiver of Section 73.3523 of the Commission's Rules. 47 C.F.R. § 73.3523.

12. Prior to the filing of the applications in this proceeding, the Commission adopted Section 73.3523 to limit any renewal settlement reimbursements to an amount not exceeding the legitimate and prudent expenses of the party receiving the reimbursement, and then only if the dismissal or withdrawal occurs after the Initial Decision stage of the hearing. See 47 C.F.R. § 73.3523(c). Thus, the current rules ban *any and all* payments by a renewal applicant to a competing applicant in return for the withdrawal or dismissal of the competing application prior to the Initial Decision stage of the comparative hearing. See 47 C.F.R. § 73.3523(b). The rule was based on the Commission's recognition that the previous approval of settlement agreements had led to abuses of the renewal process clearly not in the public interest. *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process,* 4 FCC Rcd 4780, (1989). Specific abuses mentioned by the Commission are as follows:

> Incumbent licensees are required to expend considerable amounts of money to defend against and pay off challengers, including those who are unfunded and have no real intention of owning or operating a station. Moreover, the staff and management of the incumbent are forced to spend considerable funds as well as time and effort opposing challenges to license renewals. The expenditure of such resources that otherwise might have been devoted to programming and other services, to defend against an abusive challenge is inefficient and wasteful. Non *bona fide* challenges may also discourage *bona fide* competing applicants and unnecessarily drain Commission resources. (Internal cites omitted).

4 FCC Rcd at 4782 ¶ 22.

13. The petitioners argue, however, that a waiver is warranted in this case because Class' application does not reflect the type of abusive behavior Section 73.3513(c) was designed to discourage. Thus, petitioners contend that Class' application was filed on April 30, 1991 in the sincere belief that GAF was not qualified to be a Commission licensee. This belief was predicated on the conviction of GAF's parent company and one of its former officers for criminal violations of federal securities law. Nonetheless, on March 18, 1991 the judgments of conviction in the appeals case referred to above were reversed and the case was remanded for a new trial. *U.S. v. GAF Corporation, et. al.,* 928 F.2d 1253 (2d Cir. 1991). On August 9, 1991, the U.S. Attorney's office for the Southern District of New York announced that it would not seek a new trial. Subsequently the Commission rejected the argument that the questions raised by the alleged misconduct still warranted consideration by the Commission. See *Shareholders of GAF Corporation,* 7 FCC Rcd at 3230-31 ¶ ¶ 20-23.

14. Petitioners argue that changed circumstances beyond Class' control, i.e., the termination of the criminal proceedings and the Commission's rejection, in *Shareholders of GAF Corporation,* of the arguments that the criminal allegations demonstrated that GAF lacked the basic character qualfications to be a licensee, dramatically altered Class' chances of winning in this comparative renewal proceeding. Based on those changes of circumstance, Class and GAF argue that their settlement agreement, which would resolve all aspects of this proceeding, should be approved in accordance with the Commission's general support of such efforts. Nor, they argue, would approval of the settlement establish any broad precedent since the key factor in the grant of such relief would be changes in material circumstances outside the control of the dismissing applicant. Finally, petitioners assert that Class' application was not filed for the purpose of reaching a settlement agreement and that the proposed reimbursement is substantially less than 100% of Class' fees and expenses.

15. The Bureau opposes the settlement motion arguing that it is self-serving, does not advance the public interest, and is inconsistent with the Commission's policy proscribing the reimbursement of expenses in comparative renewal proceedings such as this one. The Bureau submits that the convictions were overturned on March 18, 1991, before Class filed its application, and that the termination of the criminal proceeding occurred on August 9, 1991, long before the release of the HDO in this case and before Class voluntarily filed its Notice of Appearance on April 1, 1993, representing that it intended to appear and present evidence in this proceeding. Thus, the Bureau argues that the petitioners' claim that Class has only recently concluded that the changed circumstances have undermined the basis upon which its application was filed, is untenable.

16. Although we realize that settlement agreements may be beneficial to the public interest, we do not believe that the one before us should be approved. Section 73.3523, discussed above, was intended to eliminate some of the abuses of the Commission's renewal process. The key factor offered by Class and GAF in their joint motion for a waiver of that rule is that the termination of the criminal proceeding against GAF and the Commission's decision in *Shareholders of GAF Corporation* constitute significant changes in circumstances over which Class had no control. We do not believe that the termination of criminal proceedings on August 9, 1991 and the Commission's subsequent denial of arguments that GAF lacked the basic qualifications to be a licensee based on the criminal allegations constitute changed circumstances sufficient to justify a waiver of Section 73.3523.

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disposition of the settlement agreement seeking dismissal of the captioned Class application." Our review of the agreement reveals no such "linkage" and we predicate our approval of the agreement on the absence of any such actual relationship.

17. At the time Class filed its competing application in this proceeding, it was on notice by virtue of Section 73.3523 that it would not be entitled to any reimbursement of expenses should it decide to withdraw its application before an Initial Decision was released. It also had notice, prior to filing its application, that the Commission's general policy is not to take cognizance of non-FCC misconduct, such as the allegations against GAF, unless there has been an ultimate adjudication by an appropriate trier of fact. *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1204-1206 ¶ 48 (1986). Finally, at that time Class knew that there was no ultimate adjudication against GAF and indeed it knew that the District Court's tentative adverse findings against GAF had been set aside by the Court of Appeals. Accordingly, Class knew, or should have known that, under existing policy, the allegations against GAF would be given no consideration in this proceeding. Thus, although petitioners claim that there have been significant changes in circumstances in this proceeding due to the termination of the criminal proceedings and the Commission's decision in *Shareholders of GAF Corporation,* in fact there has been no change at all. Given the absence of a final adjudication of the criminal proceedings, the Commission, in *Shareholders,* merely implemented its well established policy, and thus, its decision was not in any way unexpected. In addition, to grant a waiver of the rule merely because some hoped for change in Commission policy did not occur would be directly contrary to the policy underlying the rule which is intended to force a challenger to fully evaluate the legal strength of its case *before* filing. See *Formation of Policies,* 4 FCC Rcd at 4784 ¶ 30. Thus, petitioners' reliance on the circumstances concerning the disposition of the allegations against GAF provides no basis for a grant of the relief requested. Having provided no other grounds that would not be present in any acceptable settlement submitted after release of an Initial Decision to support a waiver of Section 73.3523, we agree with the Bureau that on these facts petitioners' proposed settlement agreement must be rejected in light of the Commission's policy proscribing the reimbursement of expenses in comparative renewal proceedings prior to the release of an Initial Decision.

V. MOTION TO STAY

18. GAF and Class have filed a motion requesting that we stay the hearing proceedings herein until August 23, 1993, to allow for processing of the Joint Motion for Approval of Agreement for Dismissal of Application filed simultaneously therewith. In light of our action herein denying the joint motion, we will dismiss the motion to stay as moot.

VI. RENEWAL EXPECTANCY

19. Although not specifically argued by the parties, there is a matter that warrants further comment in the context of the case before us. In *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1232 (1986), the Commission held that consideration of facts concerning character that would not lead to disqualification "would no longer be a relevant criterion in comparative renewal proceedings." However, the Commission also stated the following:

> Our action today in no way prejudges consideration of compliance with the Communications Act and/or the Commission's rules and policies as it may relate to an incumbent's past broadcast record in the context of acquiring a legitimate renewal expectancy. For example, violations of the Communications [Act] or a specific commission rule or policy may militate against the finding of a meritorious record (internal citation omitted).

102 FCC 2d at 1232 fn 125.

20. To the extent that there may be ambiguity about our policy, we wish to emphasize that in comparative renewal proceedings, allegations involving a licensee's violation of the Act, rules or policies can be relevant in the determination of the weight to be given to a licensee's claim to renewal expectancy. See *Central Florida Enterprises, Inc. v. FCC,* 194 U.S. App. D.C. 118, 133 (1978); see also *Cowles Broadcasting, Inc.,* 86 FCC 2d 993, 1017 (1981), where the Commission held that violations of its rules "tend to rebut the inference derived from a record of substantial service that the licensee will continue to serve the public in a meritorious manner."

21. From the above, it would appear that alleged violations of the Commission's EEO rules, for example, if they raise a *prima facie* question about compliance with the rules, might be pertinent to the ALJ's determination of GAF's entitlement to a renewal expectancy, even if no qualifying EEO issue were designated against GAF. For this reason, we will direct the Mass Media Bureau's EEO Branch to expedite its analysis of the allegations that GAF violated our EEO rules presently pending before it. See paragraphs 4-5, above. Consistent with paragraphs 19 and 20 above, the ALJ may allow consideration in this proceeding of any EEO deficiencies either as a basic qualifying matter or in connection with the determinations concerning GAF's renewal expectancy. In doing so, the ALJ will thus have discretion to add an issue, if appropriate, to resolve disputed facts concerning any such deficiencies in GAF's EEO program and practices that may relate to the renewal expectancy determination. See *Metroplex Communications, Inc.,* 4 FCC Rcd 8149, 8163 fn.11 (Rev. Bd. 1989) rev. den.5 FCC Rcd 5610 (1990).

22. ACCORDINGLY, IT IS ORDERED That the Request for Dismissal of Motion for Deferral filed June 21, 1993 by GAF Broadcasting Company, Inc. IS GRANTED and the Motion for Deferral of Procedural Dates filed April 12, 1993, by The Fidelio Group, Inc. and the Mass Media Bureau's Motion to Dismiss filed April 16, 1993, ARE DISMISSED, as moot.

23. IT IS FURTHER ORDERED That the Petition for Reconsideration filed April 14, 1993 by Listeners' Guild, Inc., IS DENIED.

24. IT IS FURTHER ORDERED That the Joint Request for Approval of Agreement for Dismissal of Court Appeal filed June 15, 1993 by GAF Broadcasting Company, Inc. and Class Entertainment and Communications, L.P. IS GRANTED and the attached settlement agreement IS APPROVED.

25. IT IS FURTHER ORDERED That the Joint Motion for Approval of Agreement for Dismissal of Applicant filed June 23, 1993 by GAF Broadcasting Company, Inc. and Class Entertainment and Communications, L.P. IS DENIED.

26. IT IS FURTHER ORDERED That the Joint Motion to Stay Proceeding Pending Action on Settlement Agreement filed June 23, 1933 by GAF Broadcasting Company, Inc. and Class Entertainment and Communications, L.P. IS DISMISSED, as moot.

27. IT IS FURTHER ORDERED That the Mass Media Bureau's EEO Branch IS DIRECTED to expedite its review and analysis of WNCN's equal employment performance and the allegations of EEO violations raised by petitions to deny presently pending before the Branch.

28. IT IS FURTHER ORDERED That the Mass Media Bureau is directed to report the actions, analysis and reasoning of the EEO Branch in a written pleading filed with the ALJ in this proceeding as expeditiously as possible following action by the EEO Branch.

29. IT IS FURTHER ORDERED That the Request for Expedited Action filed by GAF Broadcasting Company, Inc. on August 2, 1993, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary