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Before the FCC MAIL SECTION
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-558
32280

SEP 1 3 55 PM '93

In re Applications of)
MARTHA J. HUBER)
RITA REYNA BRENT)
MIDAMERICA ELECTRONICS SERVICE, INC.)
STATON COMMUNICATIONS, INC.)
For Construction Permit for a)
New FM Station on Channel 234A)
in New Albany, Indiana)

MM DOCKET NO. 93-51
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File No. BPH-911114ME
File No. BPH-911115MC
File No. BPH-911115ML
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MEMORANDUM OPINION AND ORDER

Issued: August 31, 1993

Released: September 01, 1993

Background

1. This is a ruling on Petition To Enlarge Issues Against Staton Communications, Inc. filed on July 9, 1993, by Martha J. Huber ("Huber"). An Opposition was filed on July 22, 1993, by Staton Communications, Inc. ("Staton"). Huber filed her Reply on August 3, 1993.

2. Huber seeks the following issues:

- A. To determine whether Kenneth L. Ramsey and/or Charlie Thompson is the real-party-in-interest of Staton.
- B. To determine whether Staton made misrepresentations or lacked candor when it certified on November 13, 1991 that it was financially qualified.
- C. To determine whether Staton made representations or lacked candor in the Stock Subscription and Shareholders' Agreement submitted with its application.

Facts

Real Party-In-Interest

3. The undisputed facts establish that Ms. Mildred J. Staton ("Ms. Staton"), an African-American living within the service area and a person having broadcast experience, was solicited by Kenneth L. Ramsey ("Ramsey") through his agent Charlie Thompson ("Thompson") to become the majority voting

shareholder and the proposed station manager of the Staton venture to acquire the construction permit for an FM station in New Albany. A majority of the equity ownership set at 80 % is with Ramsey and Ms. Staton had no say in the allotment to her by Ramsey of her 20% equity interest.

4. Thompson is a broadcast consultant who had previously worked for Ramsey on other ventures. Thompson has no ownership interest in the Staton venture and holds no options for a future interest. Thompson told Ramsey about the New Albany allocation and Ramsey told Thompson to locate a person with comparative qualifications who would serve as the manager and control principal. Thompson located Ms. Staton and referred her resume to Ramsey for consideration. At Ramsey's instruction, Thompson interviewed Ms. Staton. Thompson told Ms. Staton that she would have a minority equity interest with an unidentified principal, who would be the financial backer, and that she would be required to work at the station. Ms. Staton agreed to the terms.

5. Thereafter, Thompson advised Ms. Staton that she had been "accepted". Thompson identified Ramsey to her as the majority equity owner and told her that Mr. Stanley Emert was Staton's communications counsel. Ramsey then spoke with Ms. Staton by phone and told her that she would be receiving a 20% equity interest while he would have 80% ownership and he would be the "silent partner."¹ The process to locate Ms. Staton started in October 1991 and ended one month later when Ms. Staton and Ramsey signed a Stock Subscription and Shareholders' Agreement (the "Agreement") on November 14, 1991. That was the date after the application was signed by Ms. Staton and the date on which it was mailed for filing with the Commission.

6. The Agreement was prepared by or for Ramsey without any participation by Ms. Staton who is described as the owner of 100% of the corporation's voting stock. Under its terms, Ramsey agreed to "loan" funds needed to prosecute the application up to \$150,000. That representation on the part of Ramsey is noted with the further representation that Staton has reviewed Ramsey's financial statement. The Agreement states that amounts above \$150,000 would be provided on a pro-rata basis according to the equity holdings of the two principals. Both parties further agree to personally guarantee any bank note up to an amount of \$425,000. The evidence does not disclose any substantial cash payments made by Ms. Staton.

7. Ms. Staton signed the application on November 13, 1993. In it she certified to a reasonable assurance of financing and the source of the funding was identified in Section III as the Home Federal Trust Bank of Georgia (the "bank"). Total funds needed to construct and operate were disclosed to be in the amount of \$416,303.79. The bank letter was dated November 15, 1991, and therefore there was no letter in Staton's possession when Ms. Staton certified. As noted above, she had not seen the financial statement of Ramsey

¹ It is noted that Ramsey discloses that he has an 80% non-voting equity interest in 12 ventures for FM stations in various states. This appears to be a pattern of the way he does business related to applications for new FM facilities.

before she certified to Staton's reasonable assurance. Nor was one furnished to her afterwards.

8. It was Charlie Thompson, not Ms. Staton, who arranged for a real estate agent to locate the site. The engineering was signed on November 11, 1993, and in her deposition testimony Ms. Staton had difficulty remembering his name. It was only after the application was filed that Ms. Staton first met with the real estate agent who had located the site. As noted above, an attorney had been retained by Ramsey to prosecute the application before Ms. Staton was contacted by Thompson as a prospective station manager. When bills for legal services were received, Ms. Staton forwarded them to Ramsey for payment. Ramsey pays these bills, ranging from \$12,000 to \$15,000, from his personal account. When Ramsey became dissatisfied with the legal services, it was Ramsey who recommended present counsel without consulting Ms. Staton on the "problems" encountered and the need for a new counsel. Ms. Staton accepted Ramsey's recommendation and a new communications counsel who had worked on other Ramsey related ventures was retained by Staton.

9. The reason for a two-tiered corporation was never explained to Ms. Staton. And she was never told whether she would be required to make payments for equipment or operating expenses. She testified in her deposition that she has less than \$10,000. The extent of her liabilities is not stated. The Agreement limits Ramsey's financial responsibility to \$150,000. But Ms. Staton erroneously understands that there is no limit on Ramsey's responsibility for the venture's costs and expenses. The Agreement calls for her guarantee but she has testified that it was only Ramsey's obligation to guarantee the loan.

10. It is concluded from these preliminary facts that Ms. Staton does not have an awareness of material aspects of the venture, that she will need to continuously rely on Ramsey for guidance with respect to her rights and duties as a majority voting shareholder, and that after the application was filed Ramsey continued to exercise control over the prosecution of the application with respect to the selection and payment of counsel. It is further concluded that Thompson was an agent of Ramsey (and not an agent of Staton)² and that Thompson is not a principal of the Staton venture.

Misrepresentations

² Staton represents in her Opposition that Thompson worked for a fee "as an agent for the company." Thompson states in his declaration that his role has been "as a consultant only" for which he received a fee. But there is no evidence of payment from a Staton bank account and since Ramsey was (and is) paying legal fees from his own account it is presumed that Ramsey also directly paid Thompson. From these circumstances showing Ramsey to be Thompson's principal, particularly since Thompson performed most of his services before the application was filed (e.g. selecting Ms. Staton as manager and controlling shareholder), it is concluded that Thompson was an agent of Ramsey's and not an agent of Staton.

11. Huber's theory that there was a misrepresentation or lack of candor with respect to the representation in the Agreement that Ms. Staton had reviewed Ramsey's financial statement is rejected as speculative. But that fact is probative of Ramsey's control and Ms. Staton's lack of knowledge which negates an intent to mislead or misrepresent a material fact to the Commission through the footnote in the Agreement. Therefore, only the facts relating to Ramsey as real party-in-interest and Ms. Staton's financial certification as alleged by Huber to be misrepresentations will be considered under an added issue.

12. On November 13, 1991, Staton certified on Form 301 that the applicant had a reasonable assurance of financing based on a bank letter. Ramsey obtained the bank letter in a rather hurried manner. Ramsey states in his declaration that he negotiated "the terms of the loan" with the bank's official. Ramsey furnished a form letter to the bank to facilitate its drafting. But the bank's letter was not signed until November 15, 1991, two days after Ms. Staton signed the application form and the same day that the application was filed. Ramsey's proposal was taken before a loan board which may have accounted in part for the delay. Ramsey was informally informed on November 13 that the bank letter was approved. Ramsey so informed Ms. Staton of the approval on November 13. When Ramsey received a fax copy of the letter on November 15, he called Mr. Emert and advised him of that fact and he then "mailed" a copy to Ms. Staton and to Mr. Emert.

Discussion

13. Staton does not object to the consideration of the requested issues on grounds of timeliness. The disclosure of the relationship between Ramsey and Ms. Staton and the dynamics of that relationship were not made with sufficient specificity until after the depositions were taken on June 9, 1993, and later analyzed for specific reference in the Huber Petition. See 47 C.F.R. §1.229 (b) (3) (a party has 15 days after the discovery of facts in which to seek an added issue). The Petition was filed timely by Huber and it will be considered on its merits.³

14. In opposing the real party-in-interest issue, Staton relies on the Commission's decision in Evansville Skywave, Inc., 7 F.C.C. Rcd 1699 (Comm'n 1992). In that case, the proposed manager and the person having numerical voting control was a member of a racial minority group with no broadcast experience who contributed \$1000 in capital. The person with equity control had applied for FM stations in 12 communities and had essentially the same 25-75 equity split in all ventures. The negotiations for the minority manager who received the 25% equity interest were substantially similar to those here. In Evansville, the testimony established that the manager had participated in the prosecution of the application through his nominal hiring of the attorney

³ Even if the Petition was not technically filed on a timely basis, there are questions raised of probable decisional significance and substantial public interest that require consideration of the issues. 47 C.F.R. §1.229 (c).

and the engineer, arranging for the antenna site, and arranging for the bank loan. In this case, Ms. Staton had a lesser participation although in substance the activities required substantially the same discretion on the part of the manager. In Evansville, the corporate bylaws provided a qualified conversion right of preferred to common stock in the event the applicant did not buy out the shares of the majority equity holder which was a closely held corporation. Ramsey holds no similar conversion rights here.

15. The primary distinctions between the two cases include (a) the continuing control over the attorney and the legal fees paid from Ramsey's personal account even after the application was filed, (b) the onerous one-sided Agreement which was prepared by Ramsey whereby Ms. Staton agreed to assume the risk of liability for costs and expenses for a minority equity interest of 20%, (c) the inability to obtain or the lack of concern for a full disclosure to Ms. Staton of Ramsey's financial statement as was specifically contemplated by the Agreement and (d) the control that was exercised by Ramsey over the actions of Thompson who served as Ramsey's agent without direction or control by Ms. Staton. Those circumstances which pertain here are to be considered under the applicable Commission standard that was applied by the Evansville Commission:

[I]n evaluating the validity of an applicant's stated ownership structure for comparative purposes, we focus on the question of whether the applicant has met its burden of demonstrating reasonable assurance that its proposal will be effected as described.--- To the extent an applicant's conduct or intentions are demonstrably at odds with its described ownership structure, the applicant has unquestionably failed to meet its burden of showing that its proposal is reliable---

7 F.C.C. Rcd at 1670, citing Royce Int'l B/cstg, 5 F.C.C. Rcd 7063, 7064 (Comm'n 1991). The conduct here of Ramsey selecting the replacement attorney after Ms. Staton was in place as the manager of record and after the application was filed is evidence of a substantial question on the proposal's reliability. Even more significant is the manner in which Ramsey directed the signing of the application by Ms. Staton before she saw a bank letter and without her even being in direct contact with the bank. Ms. Staton was placed at her risk when she proceeded to sign the certification without having seen the bank letter, without having participated in its being obtained, or without even seeing Ramsey's financial statement as was contemplated by the Agreement. Also, the evidence indicates that Ramsey pays the attorneys fees from his personal banking account and that there is no Staton corporate account from which expenses are paid. Cf. Pueblo Radio Broadcasting Serv., 5 F.C.C. Rcd 4829, 4832 (Review Bd 1990) (full integration denied where nonvoting stockholder had check writing authority and had written checks to pay the bills).

16. The issue here is whether Ramsey is the real party-in-interest and not just whether Staton's integration proposal is sufficient to credit in a comparative case. A disqualifying real party-in-interest issue carries with it the characteristic of a misrepresentation. The Commission has refused to add a disqualifying issue where:

[E]ven assuming that the facts warranted denying all integration credit, no showing had been made that the applicant concealed information, ignored corporate formalities, or made misrepresentations.

Virgil L. Pearman, 6 F.C.C. Rcd 1891, 1891-92 (Comm'n 1991). However, in this case the applicant through the control of Ramsey at a critical stage failed to disclose the status of the bank letter which was expressly relied upon and represented in the application to be in place at the time that Ms. Staton certified to the applicant's reasonable assurance of financing. With the letter's draft language having been provided to the bank by Ramsey, and it being represented that the letter was approved by the loan board on November 13, 1991, there remains a substantial question as to whether Ms. Staton was reasonable in her reliance on Ramsey's instruction to certify the application before she had seen the letter. There was a duty to fully disclose the status of the letter on November 13.

17. The question of Ms. Staton having a reasonable assurance when she certified raises a substantial question because she was not in direct contact with the bank. Ramsey was merely giving her and the applicant's attorney telephone instructions when she certified as to her reasonable assurance. There is also a substantial question under the circumstances as to whether information was concealed from the Commission when Staton identified the bank in Part III as the source of financing but failed to disclose the status of the bank's letter as one in embryo on November 13. After the cross examination of witnesses, including the bank officer, there could be an element of misrepresentation or a lack of candor found that is supported by substantial evidence in the failure to qualify the certification or in connection with the prospective bank letter being used on November 13 as an accommodation on the date of certification.

18. The Evansville decision found no disqualification because the evidence did not support "findings of deceptive or abusive intent" or evidence that the applicant "knowingly attempted to deceive the Commission." 7 F.C.C. Rcd at 1671. But the issue was added and the evidence was received and considered at the trial level. Here, it was essential for Staton to certify to its financial qualification or the application would be at risk and could face dismissal. Cf. Sharron Annette Haley, 6 F.C.C. Rcd 4630 (Comm'n 1991).⁴ The Commission will not permit an applicant to certify to its financial qualifications and then obtain financing. Edwin A. Bernstein, 5 F.C.C. Rcd 2843 (Comm'n 1990). Therefore, Staton had a motive to mislead the Commission at the time of its certification.

⁴ If Staton had certified "no" and sought to later amend, Staton would have needed to show good cause, for not having the letter in hand on November 13. Id. In the absence of a showing of good cause, for reasons not attributable to Ramsey (being late in requesting the bank letter would not be good cause) or Ms. Staton, that the letter could not have been obtained in time for Ms. Staton to see it and consider it before she certified, Commission precedent would preclude accepting the amendment. See Aspen FM, Inc., 6 F.C.C. Rcd 1602, 1603 (Comm'n 1991) (initial financial qualifications have become a critical ingredient in a good cause showing for an amendment).

Conclusion

19. For the foregoing reasons, there are substantial questions raised as to whether Ramsey is a real party-in-interest and whether Staton misrepresented or lacked candor in certifying "yes" before it had a bank letter in hand and /or in failing to disclose with its affirmative certification the true status of an anticipated bank letter. The trial and related discovery of these issues are consistent with current court cases. Weyburn Broadcasting Limited Partnership v. F.C.C., 984 F.2d 1220 (D.C. Cir. 1993); Astroline Communications Co. v. F.C.C., 857 F2d 1556 (D.C. Cir. 1988). The Commission rules require that a notice of forfeiture be set for the alleged misrepresentation. 47 C.F.R. §1.229 (f).

Rulings

Accordingly, IT IS ORDERED that the Petition To Enlarge Issues Against Staton Communications, Inc. filed on July 9, 1993, by Martha J. Huber IS GRANTED in part.

IT IS FURTHER ORDERED that the following issues ARE ADDED:

- A. To determine whether Kenneth L. Ramsey is the real party-in-interest to the application of Staton Communications, Inc. and, if so, whether the applicant misrepresented or lacked candor with the Commission in concealing or in failing to disclose Ramsey's control over the application.
- B. To determine whether Staton Communications, Inc. made misrepresentations or lacked candor when it certified on November 13, 1991, that it was financially qualified.
- C. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Staton Communications, Inc. is qualified to become a Commission licensee.

IT IS FURTHER ORDERED that the burden of proceeding IS ASSIGNED to Huber⁵ and the burden of proof IS ASSIGNED to Staton.

IT IS FURTHER ORDERED that the documents identified in the Appendix to Huber's Petition SHALL BE DELIVERED by Staton on or before September 09, 1993, and any supplemental discovery SHALL COMMENCE by September 13, 1993.⁶

⁵ Huber will have the responsibility for assuring the appearance of a non-party bank official by subpoena and tendered expenses.

⁶ Much of Huber's discovery has been completed. However, Huber may find it necessary or desirable to take the deposition of the bank official to determine inter alia the role, if any, that was played by Ms. Staton (e.g. her financial condition as a prospective guarantor) in obtaining the letter and what caused the letter to be issued two days after certification.

IT IS FURTHER ORDERED that the hearing of these added issues IS SET for October 19, 1993, in a Commission courtroom in Washington, D.C.⁷

IT IS FURTHER ORDERED that Huber SHALL FILE a Trial Brief on October 08, 1993, and Staton SHALL FILE a Reply Trial Brief on October 15, 1993.

IT IS FURTHER ORDERED that Trial Briefs SHALL INCLUDE: (i) a concise statement of what the party intends to prove; (ii) a brief summary of each witness' testimony in support of each proffer of proof; (iii) a list of documents to be introduced in evidence and a brief statement of the relevance of each; (iv) a statement of points and authorities which will be relied on to prevail on substantive and procedural issues.

Notice Of Forfeiture

In accordance with 47 C.F.R. §1.80(f)(1), Staton Communications, Inc. is NOW ON NOTICE that if the acts alleged by Huber as set forth above are found to be true after hearing all relevant evidence, Staton may be found to have violated Commission regulation 47 C.F.R. §73.1015 (applicants shall not submit to the Commission any written statement containing a misrepresentation or a material omission bearing on any matter within the Commission's jurisdiction).

The apparent forfeiture liability for a misrepresentation in a broadcast case is set by the Commission at \$20,000.00.⁸

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁷ The parties disclosed after Huber filed her Petition that a universal settlement has been reached which contemplates the participation of all parties in a merged entity. A written agreement is still expected to be submitted on October 04, 1993 (FCC 93M-541). If Mr. Ramsey is contemplated as a principal, the settlement will not moot this issue.

⁸ Assessment made in accord with Commission's Policy Statement In the Matter of Standards For Assessing Forfeitures, FCC 93-382, released August 12, 1993 at 3.