Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C 20554

In the Matter of	)	MM Docket No. 96-116
	)	
HOMETOWN MEDIA, INC.	)	File No. BR-950601B9
	)	
For Renewal of License	)	
for Station WAYB(AM)	)	
Waynesboro, Virginia	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: Administrative Law Judge
Joseph Chachkin

MASS MEDIA BUREAU'S OPPOSITION TO
MOTION FOR SUMMARY DECISION AND
COUNTERMOTION FOR SUMMARY DECISION

1. On July 11, 1996, Hometown Media Inc ("Hometown") filed its Motion for Summary Decision in this proceeding. Hometown supplemented its motion on July 17, 1996. The Mass Media Bureau ("Bureau"), pursuant to Section 1.251 of the Commission's Rules, 47 C.F.R. §1.251, hereby opposes Hometown's motion and submits its own Countermotion for Summary Decision.

Hometown's Motion

2. Hometown seeks to resolve the following issues in order to demonstrate that grant of its license renewal application is warranted: that it has the capability and intent to expeditiously resume the broadcast operations of Station WAYB(AM), Waynesboro, Virginia, consistent with the Commission's Rules; that it has not violated Sections 73.1740 and/or 73.1750 of the Commission's Rules; and that, in light of the evidence adduced pursuant to the preceding issues, that grant of the subject license renewal application would serve the public

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interest, convenience and necessity. *See Hearing Designation Order* in MM Docket No.96-116, DA 96-813, released May 22, 1996 ("*HDO*")

3. Pursuant to Section 1.251 of the Commission's Rules, in order to warrant summary decision, a party must show that there is no genuine issue of fact for determination at the hearing. To sustain a motion for summary decision, it must be established that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." *Big Country Radio, Inc.*, 50 FCC 2d 967 (Rev. Bd. 1975). The Bureau asserts that the facts of this case are not in dispute, and that only the legal significance of those facts remains at issue.

4. To meet the specified issues, Hometown asserts that it has negotiated to assign the WAYB license to Brenda Merica and Randall Fields ("Merica & Fields"), who are prepared to return the station to the air within ninety days. In this regard, it states that Phillip C. Showers, Hometown's President, began negotiating to assign the WAYB license to Merica & Fields shortly after the station went off the air in August 1995. These negotiations were delayed until Merica and Fields were able to negotiate successfully the purchase of a tower. During this time, Merica & Fields also were in negotiations with the major creditor of Hometown, Ken Edwards, who owns the station's assets, to purchase the equipment necessary to put the station back on the air. An agreement to transfer the assets was signed on May 24, 1996. Hometown further states that Merica & Fields have prepared and are ready to file an

assignment application and are prepared to return WAYB to the air.

5. Hometown also asserts that although it indicated that it intended to assign the WAYB license to Edwards and a group of local businessmen, as stated in the June 1995 renewal application, that plan changed when Merica & Fields expressed an interest in acquiring the station in August 1995. Showers states that as he was negotiating with Merica & Fields through the Spring of 1996, he "simply lost track of the time" and "was distracted by other matters" which prevented him from seeking to extend the authority for WAYB to remain silent. Nevertheless, Hometown claims that it proceeded in good faith to finalize a sale of the station so that it could be returned to the air. It maintains that under these circumstances and in light of its intention to assign the station license, the violations of Sections 73.1740 and 73.1750 should not be disqualifying and should not prevent a grant of the WAYB renewal application. Hometown further contends that the grant of the renewal application will serve the public interest by restoring service and allowing creditors to benefit from the proceeds of a sale of the station.

6. On July 17, 1995, after a prehearing conference was held in this proceeding, Hometown filed a supplement to its motion. Therein it relates how it intends to return the station to the air within 90 days. Hometown reports that Showers, Hometown's President, has reached an agreement with all parties as follows: Hometown will sell the station to Valley Communications L.C. ("Valley"), a company established for that purpose by Merica and Fields; Edwards, the major creditor, will lease all the broadcast equipment to Hometown for a

(renewable) period of one year or until the assignment to Valley is approved; and Edwards will make the studio site available pursuant to a lease. It states that Hometown continues to hold a valid lease for the tower site, which combined with the studio and equipment, will enable the resumption of operations. In addition, Hometown will employ Mr. Fields as General Manager and will enter into a Local Marketing Agreement ("LMA") with Valley for a (renewable) one-year term or until the assignment to Valley is approved. Hometown also states that in the event the proposed assignment to Valley is not approved, the equipment lease and the LMA will continue in effect for a year, with an option to renew.

7. Hometown thus contends that there are no genuine issues as to any material fact and that no useful purpose would be served by a hearing. It maintains that summary decision is warranted in this case because, despite its admitted rules violations, a grant of its renewal application conditioned upon the prompt restoration of service and the assignment of license to a qualified assignee will serve the public interest

The Motion for Summary Decision Cannot Be Granted

8. In an effort to meet its burden under Issue 1 in the *HDO*, Hometown initially sets forth and emphasizes its efforts to assign the station license first to Edwards, the station's major creditor, and then to Merica & Fields. Hometown also recounts what it terms the prospective licensee's considerable efforts to be able to return WAYB to the air. In its supplemental pleading, it sets forth a plan to essentially reconstruct the station based on the assignment of the WAYB license to Merica & Fields. However, in its pleadings, Hometown

ignores its own failure, as the licensee of WAYB, to restore station operations and to seek continued authority for the station to remain silent. In this proceeding, it is Hometown's burden to demonstrate that its pre-designation conduct was not dilatory in order to meet the specified issues and obtain grant of its renewal application. As is clear from the pleadings, Hometown has not and cannot make that showing.[1] Hometown may seek to assign or transfer the WAYB license, but not before it has a renewed license to convey. *See Stereo Broadcasters, Inc. v. FCC*, 652 F. 2d 1026, 1027 (D.C.Cir. 1981). In sum, the only justification that Hometown provides for the grant of its renewal application is that it has secured a potential assignee. Such a showing is not sufficient to meet its burdens with respect to the issues designated in the *HDO*.

9. Aside from its dilatory conduct, Hometown's plan to return WAYB to the air through the use of an agreement which it terms an LMA is insufficient to warrant summary decision.[2] In this regard, Hometown's reliance on the arrangement in *American Music Radio*, 10 FCC Rcd 8769 (1995) to support the use of the proposed LMA is misplaced. Here,

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[1] In fact, Hometown's admission that Showers "simply lost track of time" with regard to WAYB's silent status establishes Hometown's dilatoriness.

[2] Despite Hometown's assertion, we do not believe that Hometown's proposed arrangement with Valley is either an LMA or a time brokerage agreement. Time brokerage is "the sale by a licensee of discrete blocks of time to a 'broker' that supplies the programming to fill that time and sells commercial spot announcements in it." *See* Section 73.3555(a)(3)(iv) of the Commission's Rules. An LMA, also referred to as a cognizable time brokerage agreement, is a time brokerage agreement between two broadcast licensees of stations whose principal community contours overlap and under which more than 15% of broadcast time per week of one station is brokered by the other. *See* Section 73.3555(a)(2)(i) of the Commission's Rules. Approval of Hometown's agreement with Valley would permit Hometown to transfer control of the station to Valley without following the Commission's processing procedures.

Hometown's proposal is, essentially, to use an LMA as a vehicle to transfer control of WAYB to Valley pending assignment of the station license to Valley. The sole purpose for the LMA is to postpone the filing of an assignment application until after the station's license is renewed, in an attempt to avoid having to deal with the issues specified in the *HDO*. The critical issue in this proceeding is whether, in light of this licensee's conduct, grant of the renewal application serves the public interest. Before Hometown's renewal application can be granted, the Presiding Judge must resolve this outstanding issue in the licensee's favor which, as shown here, cannot be done. Thus, aside from the question of whether this particular LMA or any other proposed post-designation arrangement meets the standards addressed in *American Music Radio*, the licensee has not met its burdens with respect to the issues regarding the renewal of its license as designated in the *HDO*. Consequently, Hometown's motion for summary decision in its favor must be denied.

The Bureau's Countermotion for Summary Decision

10. From the facts set forth in Hometown's pleadings, the appropriate legal inferences require that the Bureau's countermotion for summary decision be granted. Not only have Hometown's predesignation efforts to restore WAYB's operations been dilatory, the record is now clear that absent renewal and the grant of an assignment, Hometown will not be able to restore the station to the air and thus meet its burden under Issue 1 of the *HDO*. Hometown admits that it currently has neither a studio nor tower site, station assets nor equipment with which to return WAYB to the air. It's plan to resume and sustain WAYB's operations is for all intents and purposes contingent on an assignment of license to Valley/Merica & Fields, an

event that will not happen. Absent such an assignment, it is clear that Hometown can not return the station to the air and that Hometown cannot be relied upon to meet the responsibilities and obligations of a Commission licensee. Thus, Hometown has failed to meet its burdens under the designated issues. Accordingly, the Bureau requests that the Presiding Judge grant its Countermotion for Summary Decision, deny Hometown's renewal application, and terminate this proceeding.

Respectfully submitted,
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July 23, 1996

CERTIFICATE OF SERVICE

Natalie Moses, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 23rd day of July 1996, sent by regular United States mail, U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Opposition to Motion for Summary Decision and Countermotion for Summary Decision**" to:

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Natalie A. Moses

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