

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

FCC 99I-18
 90677

In re Applications for Construction of
 DISPATCHED BY)
)
 GOODLETTSVILLE BROADCASTING)
 COMPANY)
)
 BLED SOE COMMUNICATIONS, LTD)
)
 HEIDELBERG-STONE)
 BROADCASTING COMPANY)
)
 WILLIAM E. BENNS, III)
)
 For a Construction Permit for a New)
 FM Broadcast Station on Channel 246C)
 at Goodlettsville, Tennessee)

MM Docket No. 88-487
 File No. BPH-861215MI
 File No. BPH-861216MD
 File No. BPH-861217MA
 File No. BPH-861217MQ

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 1999 ; Released: October 7, 1999

By the Assistant General Counsel, Administrative Law Division:

1. This order approves a settlement agreement, filed July 21, 1999, by the four remaining applicants for a new FM station on Channel 246C in Goodlettsville, Tennessee, and terminates the hearing proceeding in Docket No. 88-487.¹ The agreement provides for the merger of the applications of Goodlettsville Broadcasting Company (GBC), William E. Benns, III (Benns), Heidelberg-Stone Broadcasting Company (HSBC), and Bledsoe Communications, Ltd. (Bledsoe) into Mid-TN Broadcasters, LLC (Mid-TN), the amendment of HSBC's application to specify Mid-TN as the applicant, and the dismissal of the applications filed by GBC, Benns, and Bledsoe.² This order finds that this arrangement comports fully with Section 311(c) of the

¹ The following pleadings are pending before the Commission: (a) Joint Request for Approval of Agreement, filed July 21, 1999, by Goodlettsville Broadcasting Company, Bledsoe Communications, Ltd., Heidelberg-Stone Broadcasting Company, and William E. Benns, III; (b) Amendments, tendered for filing on July 28, and July 29, 1999, respectively, substituting Mid-TN Broadcasters, LLC for the application of Heidelberg-Stone Broadcasting Company and providing an updated engineering proposal; (c) Comments In Support of Joint Request For Approval of Settlement Agreement, filed August 2, 1999, by the Mass Media Bureau; (d) Joint Petition for Leave to Amend, filed August 4, and supplemented August 11, 1999, by Heidelberg-Stone Broadcasting Company and Mid-TN Broadcasters, LLC; and (e) Petition for Leave To Amend, filed September 1, 1999, by Mid-TN Broadcasters, LLC.

² Previously on April 14, 1999, three of the applicants (GBC, Benns, and Bledsoe) filed a settlement agreement with the Commission. The settlement agreement was supplemented by Benns on April 16 and 28, and by GBC on May 7 and 11, 1999. In comments filed May 14, 1999 the Mass Media Bureau opposed the settlement agreement. By their June 7, 1999 Notice

Communications Act and applicable Commission rules governing agreements to remove conflicts among competing broadcast applicants.

BACKGROUND

2. Of the 28 applications originally filed for a new FM station on Channel 246C in Goodlettsville, Tennessee, only the applications of Bennis, GBC, HSBC and Bledsoe are still pending before the Commission. By its decision of August 3, 1993, the Commission granted HSBC's application based upon its superior integration proposal.³ The Commission also denied a motion to reopen the record and enlarge the issues that sought the addition of reporting and lack of candor issues against HSBC. Timely notices of appeal were filed in the United States Court of Appeals for the District of Columbia Circuit by GBC, Bledsoe, and Bennis (Case Nos. 93-1492, 93-1574, and 93-1584).

3. On February 25, 1994 the Commission imposed a stay on the adjudication of all comparative broadcast cases pending resolution of the questions raised by *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), in which the court held that continued reliance on the integration criterion is arbitrary and capricious and therefore unlawful.⁴ On April 18, 1994 the court remanded this proceeding to the Commission for further consideration in light of *Bechtel*.

SETTLEMENT AGREEMENT

4. Under the terms of the proposed settlement agreement the four pending applicants -- GBC, Bennis, HSBC, and Bledsoe -- would merge to form a new limited liability company, Mid-TN, in which each applicant would have a 25 percent equity interest.⁵ In exchange for their equity interests, GBC, Bennis, and Bledsoe would dismiss their applications, and HSBC would amend its application to substitute Mid-TN as the applicant. Pursuant to the agreement, HSBC has submitted an amendment updating the engineering proposal.

5. An unrelated company, DBBC, LLC (DBBC), having no ownership interest in any of the competing Goodlettsville applications, has options, that may be exercised only after the grant of a construction permit to Mid-TN, to purchase the equity interests held by each of Mid-TN's principals. Neither the option price nor the price that DBBC must pay to purchase each of

of Withdrawal, the parties have requested the withdrawal of that proposed settlement agreement.

³ *Goodlettsville Broadcasting Company, Inc.*, 8 FCC Rcd 5178 (1993), *affirming*, 8 FCC Rcd 57 (Rev. Bd. 1992), *affirming*, *Supplemental Initial Decision*, 7 FCC Rcd 2528 (ALJ 1992).

⁴ *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

⁵ Depending upon whether the applicant is an individual, a partnership, or a corporation, each 25 percent equity interest may be proportionately divided according to the ownership interests of the principals of each applicant.

equity interests is disclosed. The Purchase Options, incorporated in five separate agreements,⁶ are exercisable no later than 30 days after the grant of a construction permit to Mid-TN becomes final, and they require that DBBC must acquire each interest simultaneously with all other outstanding equity interests in Mid-TN. An Addendum to each option agreement affords the respective Mid-TN equity holders a Buy-Back Option. As in the case of DBBC's Purchase Options, the Buy-back Options must be exercised simultaneously by all parties holding equity interests in Mid-TN. Repurchasing DBBC's Options requires the payment of a sum of money equal to any funds DBBC has previously advanced to Mid-TN, plus 125 percent of the agreed upon Purchase Price. In the event that the equity holders of Mid-TN (acting simultaneously) and DBBC both exercise their respective options, Mid-TN's Buy-Back Option takes precedence, and DBBC's option to acquire the station is cancelled.

6. The settlement agreement also contains a series of contingent, consecutive options to govern what will happen in the event that DBBC declines to exercise its options to acquire the Goodlettsville station. For 60 days after the expiration of DBBC's options, HSBC's John Heidelberg has an option to purchase the interests held by Mid-TN's other principals.⁷ If Heidelberg fails to exercise his option to purchase the equity interests of all the other principals, they have a 60-day option to acquire Heidelberg's interest for \$4,750,000. If neither option is exercised, the station will be sold and the proceeds will be divided among the Mid-TN principals in predetermined shares.⁸

7. Mid-TN has also entered into Construction and Time Brokerage Agreements with DBBC. Pursuant to those agreements, DBBC will provide Mid-TN with assistance in constructing and programming the new station in accordance with the Commission's rules. The station is to be constructed at an existing tower site owned by DBBC. To facilitate construction, DBBC will secure, subject to the permittee's direction, a suitable antenna, transmission line, and transmitter, install this equipment on the DBBC site, and it will lease the site to the permittee for 10 years at \$1,000 per month. Under the Time Brokerage Agreement, Mid-TN will have full authority over the management and operation of the station, including the right to preempt any programming it deems unsuitable or contrary to the public interest, and it will be paid consideration of an undisclosed amount each month. Both Agreements terminate in the event that DBBC acquires Mid-TN.

8. In support of the proposed settlement agreement the applicants urge that DBBC's options are consistent with third-party options routinely approved by the Commission in the

⁶ The virtually identical option agreements are between DBBC and: (1) John Heidelberg (HSBC); (2) Katherine Stone (HSBC); (3) William E. Bennis; (4) Eleanor T. Mead and D. Whitson Adamson (GBC); and (5) Ronald T. Bledsoe, Charles W. Bone and C. Michael Norton (Bledsoe).

⁷ Heidelberg must pay the following amounts to the other principals: (1) Katherine Stone: \$1,000,000; (2) Williams Bennis: \$1,750,000; (3) Eleanor Mead and Whit Abramson: \$875,000 each; (4) Ronald Bledsoe: \$1,312,500; and (5) Michael Norton and Charles Bone: \$218,750 each.

⁸ Katherine Stone 09.64%; John Heidelberg 40.65%; William Bennis 16.57%; Eleanor Mead and Whit Abramson: 08.286% each; Ronald Bledsoe 12.475%; and Michael Norton and Charles Bone 02.07125% each.

context of universal settlement agreements.⁹ In further support of the settlement agreement, the applicants rely on the Commission's repeal of the prohibition on the sale for profit of a construction permit for an unbuilt station.¹⁰ According to the settling applicants, this rule change, by eliminating the permittee's obligation to put the station on the air, allegedly moots concerns about the premature transfer of control of stations placed on the air with funds provided by an entity with an option to acquire control of the station in the future.

9. The Mass Media Bureau generally supports the settlement agreement. It views Mid-TN's reciprocal option as realistic and accordingly concludes that the merger agreement contravenes neither the Commission's prohibition against third-party agreements resulting in the award of a construction permit to a non-applicant nor the payment limitations set forth in Section 73.3525(a).

DISCUSSION

10. We will approve the agreement. It complies fully with Section 311(c) of the Communications Act and Section 73.3525 of the Commission's Rules, which govern settlement agreements among mutually exclusive applicants for new broadcast stations. The parties have attached a copy of their merger agreement and they have also submitted copies of Mid-TN's Operating Agreement and of the Option, Construction, and Time Brokerage Agreements with DBBC. By paragraph 8 of the Merger Agreement, each of the four applicants has certified under penalty of perjury that the Agreement will serve the public interest by expediting the inauguration of a new radio service in Goodlettsville, Tennessee, that their respective applications were not filed for the purpose of entering into a settlement agreement, and that, except as disclosed in the agreement, no consideration has been paid, or will be paid, to any party to the agreement.

11. Approval of this agreement is, as the applicants urge, consistent with other third-party agreements approved by the Commission, in which there was no present transfer of control but a non-applicant had an option to acquire control in the future.¹¹ Here, non-applicant DBBC

⁹ The parties cite *Frank Digesu, Sr.*, 9 FCC Rcd 7866 (Rev. Bd. 1994); *Lamar Communications, Inc.*, 6 FCC Rcd 7022 (OGC 1991); *David A. Davila*, 5 FCC Rcd 5222 (MMB 1990), *rev. denied*, 6 FCC Rcd 2897 (1991); *The Old Time Religion Hour*, FCC 87I-097 (OGC 1987).

¹⁰ See *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056, 23069-72 ¶¶ 28-34 (1998).

¹¹ See, e.g., *Woods Communications Group*, 11 FCC Rcd 5776 ¶ 6 (1996), *recon. denied*, 12 FCC Rcd 14042 ¶¶ 18, 21-24 (1997), *aff'd sub nom. Pollack/Belz Communications v. FCC* (D.C. Cir. 1998) (third party with a minority interest in permittee, and option to acquire 55 percent interest 90 days after Program Test Authority, would fund the settlement agreement and the construction of the station, but the original applicant retained a controlling interest in the permittee as well as ultimate control over the construction and operation of the proposed station and would retain ultimate program control if the parties entered into a Local Marketing Agreement); *Rem Malloy Broadcasting, Inc.*, 11 FCC Rcd 4064 ¶¶ 16-18 (Rev. Bd. 1996), *recon. denied*, 11 FCC Rcd 10823 (1996) (applicant restructured by selling 49 percent equity interest

has no present ownership interest in the proposed permittee, Mid-TN, and its options permit it to acquire control of Mid-TN only after the construction permit is granted. In the event that DBBC does exercise its options to acquire the permit, Mid-TN will need to seek Commission approval through a transfer of control application. In the meantime, the Time Brokerage and Construction Agreements with DBBC both provide that the existing permittee, Mid-TN, will retain ultimate control over the station. Further, these agreements provide an appropriate means for Mid-TN to carry out its obligations to construct and program the station. While DBBC's long-term commitment to the station represented by these agreements enhances the likelihood that DBBC will, in fact, acquire the permit, Commission rules no longer preclude the sale for profit of a construction permit to a third party. That the parties have not disclosed the purchase price, therefore, is not an impediment to approving the applicants' merger agreement. And, although the Time Brokerage Agreement provides for monthly payments to the station, the agreement would terminate if DBBC acquires the permit. In these circumstances there is no basis to construe such payments as deferred consideration for the applicants' agreements to dismiss or amend their respective applications and thus subject to Section 73.3525(a)'s payment limitations.¹²

12. Further, the provisions relating to the sale of the dismissing applicants' interests in the merged entity to DBBC reflect that their equity interests are not simply deferred cash payments in excess of any reimbursement that they could receive immediately in exchange for their agreement to dismiss their applications. First, Mid-TN does not have a "put" option by which it can require that DBBC acquire Mid-TN. The only requirement is that DBBC simultaneously exercise all its Purchase Options, thereby acquiring 100 percent of Mid-TN. Second, Mid-TN has reciprocal Buy-Back Options that take precedence over DBBC's Purchase Options. We therefore agree with the Mass Media Bureau that the Buy-Back Options are realistic. Third, apart from the possibility of DBBC's Purchase Options being cancelled through the exercise of the Buy-Back Options, the agreement contains a series of successive 60-day options specifically providing for the circumstance of DBBC's deciding not to exercise its Purchase Options.¹³ Thus, it is far from inevitable that DBBC will acquire the permit.

13. Moreover, the agreement reflects a *bona fide* merger and is thus exempt from the

to non-applicant who would finance payments due under the settlement agreement and the station's construction, receive an option to purchase a controlling interest and enter into a Program Affiliation Agreement).

¹² Compare *Tracy A. Moore*, 9 FCC Rcd 314, 314-15 ¶ 6 & n.4 (OGC 1993), approving a settlement agreement only after a consulting agreement providing that a third party would pay for consulting services rendered by one of the original applicants was modified to require that the original applicant furnish at least 400 hours of consulting services in exchange for the payments. In contrast to the situation in *Moore*, DBBC will not make payments to the Mid-TN owners if it acquires the permit; the Time Brokerage payments continue only if DBBC declines to exercise its option to acquire the permit.

¹³ John Heidelberg has 60 days to buy out the other Mid-TN principals, who have another 60 days to buy out Heidelberg. If neither option is exercised, the agreement provides for the sale of the station to a third party and spells out how the sale proceeds will be divided among Mid-TN's principals.

rule limiting any party to a settlement agreement to its legitimate and prudent expenses.¹⁴ In exchange for their 25 percent equity interests in the merged entity (Mid-TN), the principals have contributed their respective applications.¹⁵ The agreement does not provide for an immediate cash payment to any principal, which would subject the merger to heightened scrutiny.¹⁶ Significantly, all income gain or loss from the station's operations is, pursuant to the Operating Agreement, to be shared amongst Mid-TN's principals in accordance with their individual equity interests. This provision corroborates that the merger represents a consensual sharing of risks and benefits reflecting the assets each principal has contributed to Mid-TN.

14. The provisions relating to the sale of the permit if it is not acquired by DBBC, however, specify that, instead of the proceeds being distributed according to each applicant's 25 percent equity interest, HSBC's principals (John Heidelberg and Katherine Stone) would receive roughly 51 percent, with the remainder being divided equally among Benns, Bledsoe, and GBC. (The amounts will vary depending on whether the ultimate permittee is Heidelberg, a consortium of the other Mid-TN equity holders, or a third party.¹⁷) This circumstance does not detract from the *bona fides* of the merger agreement or provide a basis to construe the sales proceeds paid to the dismissing applicants as deferred cash payments in exchange for their agreement to dismiss or amend their applications. The unequal distribution of the sales proceeds may simply reflect the fact that HBSC was not part of an earlier proposed settlement (and the commensurate willingness of the other three applicants to avoid the need for further procedures in this

¹⁴ See Section 73.3525(a)(3) expressly exempting participants in a *bona fide* merger from having to submit "[a] certification that neither the applicant nor its principals has received any money or other consideration in excess of the legitimate and prudent expenses of the applicant."

¹⁵ Only GBC received something in addition to its equity interest in Mid-TN in that the merged entity has agreed to assume debts of up to \$60,000 owed to GBC's two stockholders.

¹⁶ Compare *Gonzales Broadcasting Inc.*, 12 FCC Rcd 4662 ¶¶ 13-20 (OGC 1997), *recon. granted*, 12 FCC Rcd 12253 (1997), in which a hybrid merger agreement involving immediate cash payments to the dismissing applicants was initially dismissed on the ground that it violated Section 73.3525(a)'s limitations on reimbursements to dismissing applicants, but was ultimately approved pursuant to a subsequent waiver of that provision. See also *Amendment of Section 73.3525*, 6 FCC Rcd 2901, 2902 (1991), in which the Commission stated that it would examine with a heightened level of scrutiny any merger proposal where the dismissing applicants receive cash, either immediately or on a deferred basis, and the cash payment is guaranteed regardless of the outcome of the business venture.

¹⁷ In the event of a buy-out by the other Mid-TN principals, Heidelberg will receive \$4,750,000 in cash. If Heidelberg buys out the other principals, HSBC's Katherine Stone will receive \$1,000,000, and Benns, GBC, and Bledsoe will each receive \$1,750,000, which in turn will be divided among the principals of each applicant. If neither Heidelberg nor the other principals exercise their buy-out options and the permit is sold to a third-party, HSBC's principals Heidelberg and Stone will receive 40.65 percent and 9.64 percent, respectively, of the sale proceeds; Benns' sole owner will receive 16.57 percent; GBC's owners Eleanor Mead and Whit Adamson 8.286 percent each, and Ronald Bledsoe will receive 12.4275 percent and Bledsoe's other two owners will receive 2.07125 percent each.

proceeding).¹⁸

15. Furthermore, the contingent, consecutive 60-day buy-out options held, first, by Heidelberg and, second, by the other Mid-TN principals do not contain reciprocal options whereby the equity owners can either require, or prevent, a buy-out. Under these circumstances, any subsequent buy-out decision -- whether made by Heidelberg within 60 days after the expiration of DBBC's option, 60 days thereafter by the other Mid-TN principals, or by a third party secured by a media broker more than a year later -- will presumably depend on the station's objective financial prospects. As in the case of any payments that DBBC would make if it exercised its Purchase Options, there is thus no basis to construe any payments to the Mid-TN equity holder(s) (whether the payer is Heidelberg, the other Mid-TN principals, or an unrelated third party) as cash payments made in exchange for the dismissal of their applications. And, because the totality of circumstances reflects a consensual sharing of risks and benefits, there is thus no requirement under Section 73.3525(a) that the applicants document their expenses or certify that they will not receive consideration in excess of their legitimate and prudent expenses

16. ACCORDINGLY, IT IS ORDERED, Pursuant to the authority delegated under 47 C.F.R. § 0.251(c):

(a) That the Joint Petition for Leave to Amend, filed on August 4, and supplemented on August 11, 1999, by Heidelberg-Stone Broadcasting Company and Mid-TN Broadcasters, LLC IS GRANTED; that the Amendments, tendered for filing on July 28, July 29, and August 11, 1999 ARE ACCEPTED;¹⁹ that the Petition for Leave to Amend, filed on September 1, 1999, by Mid-TN Broadcasters, LLC IS GRANTED; that the attached Amendment, dated August 30, 1999 IS ACCEPTED;²⁰ and that the amendment, dated March 17, and tendered for filing on March 18, 1999 by Goodlettsville Broadcasting Company, Inc. IS ACCEPTED.²¹

(b) That the Joint Request for Approval of Agreement, filed July 21, 1999 by

¹⁸ See note 2, *supra*.

¹⁹ In their August 4, 1999 Joint Petition for Leave to Amend, HSBC and Mid-TN request that the Commission accept two amendments tendered for filing on July 28, and 29, 1999. The first amendment substitutes Mid-TN, instead of HSBC, as the applicant. The second amendment provides an updated engineering proposal. At the request of the Mass Media Bureau, Mid-TN and HSBC on August 11, 1999 supplemented the Joint Petition to submit a further amendment reflecting the ownership of Mid-TN. All three amendments are supported by good cause and will therefore be accepted.

²⁰ The amendment reflects that on August 15, 1999 the FAA issued a determination of no hazard for the new transmitter site. The attached FAA aeronautical study indicates that the determination of no hazard is granted, provided that an appropriate condition, as set forth below, is inserted in the construction permit. The amendment is supported by good cause and will therefore be accepted.

²¹ Pursuant to Section 1.65, 47 C.F.R. § 1.65, GBC submitted an amendment reflecting the applicant corporation's purchase of the stock interests of three of its original five stockholders. The amendment is supported by good cause and therefore will be accepted.

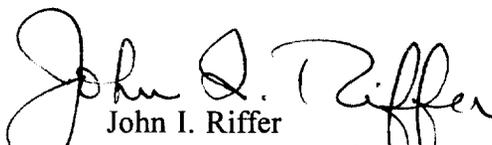
Goodlettsville Broadcasting Company, Bledsoe Communications, Ltd., Heidelberg-Stone Broadcasting Company, and William E. Bennis, III IS GRANTED; that the attached Merger Agreement IS APPROVED; that the applications filed by Goodlettsville Broadcasting Company (File No. BPH-861215MI), Bledsoe Communications, Ltd. (File No. BPH-861216MD), and William E. Bennis (File No. BPH-861217MQ) ARE DISMISSED; and that the application filed by Heidelberg-Stone Broadcasting Company (File No. BPH-861217MA), as amended to specify Mid-TN Broadcasters, LLC as the applicant, IS GRANTED subject to the following condition:

Upon receipt of notification from the Federal Communications Commission that harmful interference is being caused by the licensee's (permittee's) transmitter, the licensee (permittee) shall either immediately reduce the power to the point of no interference, cease operation, or take such immediate corrective action as is necessary to eliminate harmful interference. This condition shall expire after one year of interference-free operation.

(c) That the Notice of Withdrawal, filed June 7, 1999 by Goodlettsville Broadcasting Company, Inc., William E. Bennis, III and Bledsoe Communications, Ltd. IS ACCEPTED; and that the following pleadings ARE DISMISSED: (1) Joint Request for Approval of Agreement, filed April 14, 1999 by William E. Bennis, III, Bledsoe Communications, Ltd., and Goodlettsville Broadcasting Company, Inc.; (2) Supplement to "Joint Request for Approval of Agreement," filed April 16, 1999 by William E. Bennis, III; (3) Further Supplement to "Joint Request for Approval of Agreement," filed April 28, 1999 by William E. Bennis, III; (4) Third Supplement to "Joint Request for Approval of Agreement," filed May 7, 1999 by Goodlettsville Broadcasting Company, Inc.; (5) Fourth Supplement to "Joint Request for Approval of Agreement," filed May 11, 1999 by Goodlettsville Broadcasting Company, Inc.; and (6) Contingent Petition for Leave to Amend, filed May 28, 1999 by William E. Bennis, III; and

(d) That the hearing proceeding in Docket MM 88-487 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION


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