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

In the Matter of)
)
FAMILY BROADCASTING, INC) EB Docket No. 01-39
)
Order to Show Cause Why the Licenses for)
Stations WSTX(AM) and WSTX-FM,)
Christianstead, U.S. Virgin Islands,)
Should Not Be Revoked)

To: The Commission

**ENFORCEMENT BUREAU'S
REPLY TO EXCEPTIONS OF FAMILY BROADCASTING, INC.**

1. On June 9, 2005, Family Broadcasting, Inc. ("Family") filed a pleading styled "Exceptions of Family Broadcasting, Inc." ("Exceptions"), by which Family excepts to the *Initial Decision on Remand of Chief Administrative Law Judge Richard L. Sippel*.¹ The *ID* denied applications for approval of the proposed transfer of control of Family from its principal owners, Gerard A. Luz James ("Luz James") and his wife, Asta, to their four adult children,² and revoked Family's licenses for Stations WSTX(AM) and WSTX-FM. Pursuant to section 1.277(c) of the Commission's rules,³ the Enforcement Bureau hereby submits its reply brief.

2. Summary. Family contends that the issuance of the *ID* "was error" because Family had filed an application for review of the Media Bureau's dismissal of its

¹ FCC 05D-01 (rel. May 13, 2005) ("*ID*").

² See File Nos. BTC-20010315AAJ and BTCH-20010315AAK ("Transfer Applications").

³ 47 C.F.R. § 1.277(c).

applications to sell the stations to Caledonia Communications Corporation ("Caledonia") pursuant to the Commission's Minority Distress Sale Policy.⁴ Family also notes that it has filed for bankruptcy and anticipates filing applications to assign the stations to a Receiver in the near future. It argues that the *ID* should not have been released in light of those facts. As explained herein, Family's claim of error, which is nothing more than its latest attempt to delay the loss of the subject licenses, is baseless and should be rejected.

3. Background. By *Order to Show Cause and Notice of Opportunity for Hearing*,⁵ the Commission commenced this proceeding to determine whether the captioned broadcast licenses held by Family should be revoked. In paragraph 22 of the *OSC*, the Commission specified the following issues for resolution at hearing:

- (a) To determine whether Family Broadcasting, Inc. misrepresented facts to and/or lacked candor with the Commission in its statements regarding the relocation of WSTX-FM's transmitter from its authorized site in violation of Section 73.1015 of the Rules;
- (b) To determine whether Family Broadcasting, Inc. willfully or repeatedly violated Sections 1.89 and/or 73.1015 of the Rules by failing to respond to official Commission correspondence and inquiries;
- (c) To determine whether Family Broadcasting, Inc. willfully or repeatedly violated Sections 73.1350(a), 73.1560(a), 73.1560(b) and/or 73.1690(b)(2) of the Rules by operating WSTX(AM) and WSTX-FM at variance from the terms of their authorizations;

⁴ See BAL-20030304AAX and BALH-20030304AAW (the "Family/Caledonia Assignment Applications"), which were dismissed by Letter to Daniel A. Huber, Esq. from Peter H. Doyle, Chief, Audio Division, Media Bureau (Oct. 27, 2003) ("Chief's Letter"). Both FBI and Caledonia sought Commission review of the Chief's Letter pursuant to 47 C.F.R. § 1.115. To date, the Commission has not ruled on the Family and Caledonia applications for review of the Chief's Letter, nor has it stayed the instant proceeding. The Commission's Minority Distress Sale Policy is outlined in *Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 983 (1978); *Commission Policy Regarding Advancement of Minority Ownership of Broadcasting*, 92 FCC 2d 849, 851 (1982).

⁵ 16 FCC Rcd 4330, *recon. denied*, 16 FCC Rcd 12810 (2001) ("*OSC*").

(d) To determine whether Family Broadcasting, Inc. willfully or repeatedly violated Section 73.49 of the Rules by failing to enclose WSTX(AM)'s antenna within an effective locked fence;

(e) To determine whether Family Broadcasting, Inc. willfully or repeatedly violated Section 11.35 of the Rules by failing to install and maintain operational EAS equipment for WSTX(AM) and WSTX-FM;

(f) To determine whether Family Broadcasting, Inc. willfully or repeatedly violated Section 73.3526 of the Rules by failing to maintain public inspection files for WSTX(AM) and WSTX-FM;

(g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Family Broadcasting, Inc. is basically qualified to be or remain a Commission licensee; and

(h) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the licenses for WSTX(AM) and/or WSTX-FM should be revoked.

The Commission also directed that, regardless of the resolution of those issues, the presiding administrative law judge (the "Presiding Judge") should also determine whether to issue an Order of Forfeiture against Family in an amount not to exceed two hundred seventy five thousand dollars (\$275,000) for willfully and/or repeatedly violating sections 1.89, 11.35, 73.49, 73.1015, 73.1350(a), 73.1560(a), 73.1560(b), 73.1690(b)(2) and/or 73.3526 of the rules.⁶

4. Following the filing of cross motions for summary decision, the Presiding Judge resolved all issues against Family and ordered that the licenses for Stations WSTX(AM) and WSTX-FM be revoked.⁷ The Presiding Judge did not impose a forfeiture.⁸

⁶ See OSC, ¶ 24, citing 47 U.S.C. § 503(b) and 47 C.F.R. § 1.80.

⁷ *Family Broadcasting, Inc.*, Summary Decision of Administrative Law Judge Richard L. Sippel, 16 FCC Rcd 15619 (ALJ 2001) ("SD").

⁸ SD, 16 FCC Rcd at 15635, ¶ 49.

5. By *Memorandum Opinion and Order and Hearing Designation Order*,⁹ the Commission affirmed the Presiding Judge's conclusion that revocation of the station licenses was warranted if Luz James remained in control of Family. However, the Commission set aside the *SD*'s ultimate determination, ruling that, in light of the pending Transfer Applications, revocation of the licenses should not have occurred without consideration of the issue of whether grant of those applications, and the resulting transfer of control of the stations from Luz and Asta James to their four adult children, would serve the public interest. Accordingly, the Commission remanded the proceeding to the Presiding Judge for resolution of the following issues:

- (a) To determine whether, if the transfer of control applications are approved, Family Broadcasting Inc. will be influenced or controlled by Gerard Luz James;
- (b) To determine whether transferors Gerard and Asta Luz James, as either creditors or debtors of Family Broadcasting Inc. or in any other capacity, will benefit, directly or indirectly, if the transfer of control applications are approved;
- (c) To determine whether transferee Barbara James-Petersen, in her capacity as general manager from July 1998 until March 2001, misrepresented facts and or lacked candor with the Commission concerning the operation of WSTX(AM) and WSTX-FM;
- (d) To determine whether transferee Barbara James-Petersen, in her capacity as general manager from July 1998 until March 2001, willfully or repeatedly operated WSTX(AM) and WSTX-FM at variance from the terms of their licenses;
- (e) To determine whether transferee Barbara James-Petersen, in her capacity as general manager from July 1998 until March 2001, willfully or repeatedly violated Sections 1.89 and/or 73.1015 of the Rules by failing to respond to official Commission correspondence and inquiries;
- (f) To determine whether transferee Barbara James-Petersen will operate WSTX(AM) and WSTX-FM independently of any control or influence

⁹ *Family Broadcasting, Inc.*, 17 FCC Rcd 6180 (2002) ("*MO&O/HDO*").

from transferors Asta and Gerard Luz James;

- (g) To determine whether transferee Barbara James-Petersen will have sufficient financing and managerial capacity to ensure enclosure within an effective locked fence of WSTX(AM)'s antenna as required by Section 73.49;
- (h) To determine whether transferee Barbara James-Petersen will have sufficient financing and managerial capacity to ensure the installation and maintenance of operational EAS equipment for Stations WSTX(AM) and WSTX-FM as required by Section 11.35;
- (i) To determine whether Family Broadcasting, Inc. under the direction of transferee Barbara James-Petersen will operate WSTX(AM) and WSTX-FM in accordance with the Rules, the Communications Act, and the terms of their authorizations as required by Sections 73.1350(a), 73.1560(a), 73.1560(b), and 73.1690(b); and
- (j) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether approval of the transfer of control application will serve the public interest.

The Commission stated that, in the event that issue (j) was resolved in a manner adverse to Family, the licenses for Stations WSTX(AM) and WSTX-FM would be revoked.

6. On February 24, 2003, before testimony was taken on the issues specified in the *MO&O/HDO*, Family filed a Petition for Extraordinary Relief ("Petition"), in which it invoked the Commission's Minority Distress Sale Policy.¹⁰ Family proposed to seek approval of an assignment of the captioned stations' licenses to Caledonia, an entity that Family claimed to be minority-controlled, and thus a qualified distress sale purchaser. By *Order*,¹¹ the Presiding Judge granted Family's Petition, and Family filed the promised applications shortly thereafter.¹² However, as noted above, the Chief, Audio Division,

¹⁰ See note 4, *supra*.

¹¹ See *Order*, FCC 03M-09 (rel. Feb. 26, 2003).

¹² See the Family/Caledonia Assignment Applications.

Media Bureau, dismissed the Family/Caledonia Assignment Applications on October 27, 2003.¹³

7. In light of this development, the Presiding Judge conducted an evidentiary hearing on the issues designated in the *MO&O/HDO* in Washington, D.C. on March 16, 2004. Both Family and the Bureau proffered witness testimony and documentary exhibits. After repeatedly staying further procedural dates in light of the pendency before the Commission of the applications for review of the Chief's Letter,¹⁴ the Presiding Judge established a deadline of April 4, 2005, for the submission of proposed findings of fact and conclusions of law, in the event that the Commission had not otherwise disposed of the case.¹⁵ In accordance with the Presiding Judge's December 6, 2004, *Order*, the Bureau filed proposed findings on April 4, 2005. Family did not. Instead, Family filed a pleading styled "Request for Stay in Lieu of Proposed Findings and Conclusions," which the Presiding Judge denied.¹⁶ As noted above, the Presiding Judge issued the *ID* on May 13, 2005.

8. Arguments Addressed to Family's Exceptions. In its Exceptions, Family does not argue that any particular finding or conclusion in the *ID* is erroneous.¹⁷ Rather, citing

¹³ See note 4, *supra*.

¹⁴ See *Order*, FCC 04M-16 (rel. Apr. 30, 2004); *Order*, FCC 04M-21 (rel. July 1, 2004); *Order*, FCC 04M-29 (rel. Oct. 1, 2004); *Order*, FCC 04M-40 (rel. Dec. 6, 2004).

¹⁵ See *Order*, FCC 04M-40 (rel. Dec. 6, 2004), *erratum* (Jan. 12, 2005).

¹⁶ See *Memorandum Opinion and Order*, FCC 05M-24 (rel. Apr. 22, 2005).

¹⁷ Indeed, Family's Exceptions ignore the most basic procedural requirements for such pleadings. See 47 C.F.R. §§ 1.48(a) (spacing) and 1.276(a)(2) (table of contents, table of citations, and concise statement of the case).

LaRose v. FCC,¹⁸ Family seems to argue that the Presiding Judge should not have issued the *ID* as long as the Family/Caledonia Assignment Applications (the distress sale applications) were pending, and it further seems to argue that the Commission should take no action in light of Family's bankruptcy filing. The Bureau disagrees.

9. As to Family's current situation, *LaRose* is distinguishable. *LaRose* involved an adjudicated bankrupt, the receiver of which was attempting to sell the bankrupt estate's assets and related broadcast license to provide an almost full recovery of innocent creditors' claims. The Court in *LaRose* took issue with the Commission's decision not to consider the proposed sale because the Commission had already denied the underlying broadcast station license.

10. In the instant case, Family has merely commenced the bankruptcy process by filing a petition for bankruptcy and a *pro forma* assignment application to change the licensee from Family to Family Broadcasting, Inc, debtor in possession.¹⁹ At present, so far as the Bureau is aware, the bankruptcy court has not determined that Family qualifies for bankruptcy protection, much less that Family has a plan to sell the stations for the benefit of innocent creditors. Consequently, at a minimum, unless and until Family can demonstrate that it qualifies as a bankrupt entity and that the proposed sale of the stations

¹⁸ 494 F.2d 1145 (D.C. Cir. 1974).

¹⁹ See *In re Family Broadcasting, Inc., Debtors*, Case No. 105-00004 (U.S.V.I., filed Apr. 13, 2005). See also File No. BAL-20050513ABQ.

will comply with the Commission's *Second Thursday* doctrine,²⁰ which governs a bankruptcy trustee's disposition of a license of a station whose predecessor licensee stood accused of wrongdoing, there is no justification for concluding that issuance of the *ID* was erroneous or to stay the instant proceeding. Indeed, considering the procedural posture of this case – the Commission affirmed the Presiding Judge's resolution of misrepresentation and station operation issues against Family over three years ago – the Bureau questions whether *Second Thursday* relief should be available at all to Family. In any event, Family has failed to demonstrate that, even if its principals will no longer operate the stations in the event of their sale, they will derive no direct benefit from the sale or only an indirect benefit which is outweighed by equitable considerations in favor of innocent creditors. In view of all the foregoing, the Bureau submits that Family has not demonstrated that it was error to issue the *ID*.

11. With respect to the pending distress sale, the Bureau notes that *LaRose* has no relevance whatsoever. Thus, there is no support for Family's contention that the Presiding Judge was required to continue to wait for the Commission to act on the pending distress sale.

12. Accordingly, the Bureau submits that Family's Exceptions should be denied,

²⁰ See *Second Thursday Corp.*, 22 FCC 2d 515 (1970), 25 FCC 2d 112 (1970) (assignment allowed in the context of a bankruptcy provided that the individuals charged with the misconduct will have no part in future station operations and will either derive no benefit from the assignment or only an indirect benefit which is outweighed by equitable considerations in favor of innocent creditors).

the *ID* should be affirmed, and Family's licenses for Stations WSTX(AM) and WSTX-FM should be revoked.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James W. Shook", with a long horizontal flourish extending to the right.

William D. Freedman
Deputy Chief, Investigations and Hearings Division
James W. Shook
Special Counsel
Enforcement Bureau

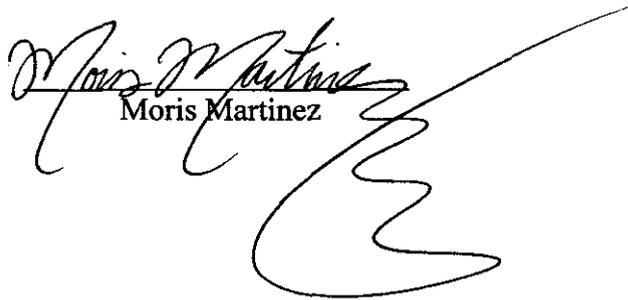
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June 22, 2005

CERTIFICATE OF SERVICE

Moris Martinez, a staff assistant in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 22nd day of June, 2005, sent by first class United States mail a copy of the foregoing "Enforcement Bureau's Reply to Exceptions of Family Broadcasting, Inc." to:

Daniel A. Huber, Esquire
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Moris Martinez