



Federal Communications Commission
Washington, D.C. 20554

July 11, 2007

In Reply Refer to:
1800B3-TH

James E. Boardman, P.C.
312 Main Street
P.O. Box 650
St. Joseph, MI 49085

Mr. Curtis V. Murphy
711 E. Britain Avenue
Benton Harbor, MI 49022

In Re: Flats Economic Development Corp.
WVBH-LP, Benton Harbor, Michigan
Facility ID No. 126875

**Minor Modification of Licensed
Facilities (FCC File Numbers
BPL-20051202AIT and BLL-
20060118ADK)**

Dear Mr. Boardman and Mr. Murphy:

After our grant of the above-referenced applications, we became aware of a dispute over the corporate status and control of the above-referenced licensee, listed in our database as "Flats Economic Development Corp." ("FEDC").¹ Two different groups claim to control FEDC: (a) Mr. Boardman's client, which we will refer to as "Flats 1";² and (b) Mr. Murphy's group, which we will refer to as "Flats 2".³ Based on our investigation of this matter, we have determined that Flats 1 is authorized to control WVBH-LP and that Flats 2 is not authorized to control the station. Accordingly, we are directing Flats 1 to file appropriate applications for authorization to resume operation of WVBH-LP under its control. We are also directing Flats 2 to discontinue operation of WVBH-LP immediately.

¹ Our review of the database of the Michigan Department of Labor & Economic Growth ("DLEG") shows that the corporation originally was formed on May 9, 2000, as "The Flats Economic Development Corporation of Michigan" and that amendments to the certificate of incorporation were filed in 2005 to change the name to "Flats Economic and Community Development Corporation of Michigan" and in 2006 to change the name back to "The Flats Economic Development Corporation of Michigan." However, DLEG has assigned the same identification number to the corporation since its formation. We will refer to the company herein as FEDC regardless of which corporate name arguably was in use at any given time.

² Flats 1 consists of Scott Elliott, Teresa Kelly, Rich Ray, Rich Hensel, James Childs, Ron Singleton, and Greg Cleveland.

³ Flats 2 consists of Mr. Murphy, Charles Johnson, Joel Patterson, Archie Davis, and Helen Mitchell.

Background. FEDC is a non-profit, non-stock corporation. Accordingly, we analyze *de jure* control of FEDC based on the membership of the company's Board of Directors.⁴ The original FEDC Board of Directors consisted of ten persons: Charles Johnson, Delores J. Gross-Johnson, Joyce Smith, Etta Harper, James Turner, Desmond Murray, Leonard Seawood, Charlotte Pugh, Earlene Sisson and Charles Kelly. This group ("Original Flats") was listed in FEDC's Articles of Incorporation and FEDC's original application for the WVBH-LP construction permit, which was granted on June 30, 2003.⁵

On October 1, 2003, DLEG automatically dissolved FEDC due to failure to file annual reports. By this time, some of the members of Original Flats had ceased to be involved in FEDC, but the remaining members proceeded with the effort to establish a low power FM station in Benton Harbor. They enlisted the assistance of Mr. Murphy in that effort. FEDC applied to modify the station's construction permit on March 4, 2004, in an application signed by Mr. Kelly as President of FEDC and by Mr. Murphy as Consultant to FEDC.⁶ That application proposed operation of the station from 711 E. Britain Street in Benton Harbor, a site that Mr. Murphy had apparently obtained for FEDC.

By early September of 2004, there was a rift between Mr. Murphy and the remaining members of Original Flats, resulting in Mr. Murphy's termination by FEDC. In turn, Mr. Murphy had become aware of FEDC's dissolution by DLEG, and he took steps to reactivate FEDC with a new Board of Directors. On September 18, 2004, he sent an email to DLEG as a representative of FEDC, stating: "We now have new board members and would like to know what we have to do to have our status changed to active?"⁷ On September 25, 2004, Mr. Murphy and other members of Flats 2 held a meeting at 711 E. Britain Street in Benton Harbor for the purpose of "reactivating" FEDC and appointing Mr. Murphy as General Manager of WVBH-LP.⁸ The minutes for that meeting listed the members of Flats 2 as the members of FEDC's Board of Directors.⁹

On November 12, 2004, Mr. Murphy filed annual reports for FEDC with DLEG for the years 2001-04.¹⁰ The 2001-03 reports listed the following members of Original Flats as FEDC's Board of Directors: Mr. Johnson, Ms. Smith, Ms. Harper, Mr. Kelly, and Mr. Murray. Mr. Johnson was listed as President of FEDC, and the Resident Agent was listed as Joyce Smith at 76 Wall Street in Benton Harbor. The 2004 report listed a different group of directors, consisting of the members of Flats 2. That report listed Mr. Murphy, at the 711 E. Britain Street address, as FEDC's Registered Agent.

⁴ See *Black Television Workshop of Los Angeles, Inc.*, Decision, 8 FCC Rcd 4192, 4196 (1993), *recon. denied*, 8 FCC Rcd 8719 (1993), *rev. denied*, 9 FCC Rcd 4477 (1994), *aff'd mem. sub nom. Woodfork v. FCC*, 70 F.3d 639 (D.C. Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996), *rehearing denied*, 518 U.S. 1046 (1996) (group that effectuated an unauthorized transfer of control by replacing seven of eight board members with three new members "has no legitimate claim" to the station's authorization).

⁵ File No. BNPL-20000901AEU.

⁶ File No. BMPL-20040304ACB.

⁷ Letter from Curtis V. Murphy to James D. Bradshaw, Deputy Chief, Audio Division, dated March 17, 2006, Attachment 2 at 2.

⁸ See "(Organizational) Board Minutes" dated September 25, 2004 ("Flats 2 Minutes").

⁹ *Id.* The Flats 2 Minutes were signed by Mr. Johnson as President and Ms. Mitchell as Secretary of FEDC.

¹⁰ Mr. Murphy signed each report as an "authorized officer or agent" of FEDC.

In the meantime, Mr. Kelly, a member of Original Flats and a leader of Flats 1, took steps to reassume control of the station. Mr. Kelly, as President of FEDC, signed an application to relocate the station from the 711 E. Britain Street address to 78 Wall Street in Benton Harbor.¹¹ The station was licensed to operate at that location on March 8, 2005.¹²

In response to that modification application, Flats 2, through Mr. Johnson, sent Mr. Kelly a letter stating:

Our board is the legally recognized representatives [sic] of the Flats Economic Development Corporation of Michigan. In October of 2003 the state of Michigan [d]issolved the Flats Economic Development Corporation of Michigan. In September 2004 several individuals and myself [sic] resolved to reorganize and reactivate the Flats Economic Development Corporation of Michigan. On November 15, 2004 the State of Michigan sent us our certificate of [g]ood standing thereby officially recognizing our board as the legal representatives. We are informing you that you must cease acting as the chairman, member, or representative of the Flats Economic Development Corporation of Michigan. . . . Also, we do not authorize you to broadcast or transmit as WVBH-LP 105.3FM from 76 Wall Street, Benton Harbor, Michigan under the name of the Flats Economic Development Corporation of Michigan. We have notified the Federal Communications Commission of the situation and awaiting [sic] permission to rebroadcast from the previous site at 711 E. Britain Avenue, Benton Harbor, Michigan.¹³

Mr. Murphy subsequently signed a modification application to relocate the station to the 711 E. Britain Avenue address. A license for that modification was granted on January 19, 2006. Shortly thereafter, on February 5, 2006, Mr. Kelly died. On February 15, 2006, Teresa Kelly sent the Commission a letter contesting the grant of Mr. Murphy's applications on behalf of FEDC, arguing that Mr. Murphy was not authorized to act for FEDC and that he was illegally attempting to take control of the station and FEDC. Ms. Kelly claimed that FEDC's "Board of Directors remains the same", but she did not specify who belonged to the Board of Directors and she did not mention Mr. Kelly's death.¹⁴

On March 17, 2006, Mr. Murphy filed a response to Ms. Kelly's letter.¹⁵ In that letter, he claimed that he, together with Mr. Johnson and other unnamed individuals, had reactivated FEDC with a new Board of Directors. He stated that Ms. Kelly's letter referred to "Flats Community Economic Development Corporation" and that this corporation, with a different name than FEDC, is a different organization.¹⁶ However, the claim that Flats 1 had formed a new organization is contradicted by an

¹¹ File No. BPL-20041108AAD, granted on Nov. 12, 2004.

¹² File No. BLL-20041129AKC.

¹³ Letter from Charles Johnson to Charles Kelly, dated Dec. 15, 2004.

¹⁴ Letter from Teresa M. Kelly to James D. Bradshaw, Audio Division, Media Bureau, dated February 15, 2006.

¹⁵ Letter from Curtis V. Murphy to James D. Bradshaw, Audio Division, Media Bureau, dated March 17, 2006 ("Murphy Letter").

¹⁶ *Id.* at 2.

email that Mr. Murphy sent to the Commission on June 3, 2005, in which he described Mr. Kelly as “a disgruntled former member of our organization.”¹⁷

Flats 1 filed a supplement to Ms. Kelly’s complaint with a letter dated June 9, 2006.¹⁸ The Flats 1 supplement stated that FEDC’s Board of Directors (*i.e.*, Flats 1) consisted of the following persons: Scott Elliott, member since 2001, President as of March 16, 2006; Teresa Kelly, member since 2000; Rich Ray, member since 2001; Rich Hensel, member since 2001; James Childs, member since 2001; Ron Singleton, member since 2000; and Greg Cleveland, member since 2006.¹⁹

The Flats 1 supplement reported that Flats 2 had commenced operation of a station using the WVBH-LP call sign and frequency in the summer of 2006.²⁰ Because WVBH-LP is not authorized to operate at the Wall Street location, Flats 1 has discontinued operating a station at that location. Thus, WVBH-LP currently operates at the 711 E. Britain Avenue address under the control of Flats 2.

Flats 1 has provided a copy of corporate minutes for a meeting of FEDC on September 17, 2000, at which six of the ten members of Original Flats participated.²¹ Flats 1 also provided a copy of corporate minutes for a meeting of FEDC on January 30, 2001, at which three of the ten members of Original Flats participated and at which five out of seven members of Flats 1 (Mr. Elliott, Ms. Kelly, Mr. Ray, Mr. Hensel and Mr. Singleton) were unanimously voted in as members of the FEDC Board of Directors.²² Flats 2 did not provide the Commission with documentation showing that any of the members of Flats 2 were duly appointed to the FEDC Board of Directors, either pursuant to a unanimous consent resolution or at a meeting held with proper notice and a quorum.²³

Neither Flats 1 nor Flats 2 ever filed an application for consent to transfer control of FEDC from Original Flats to a successor Board of Directors. Neither group has challenged the other group’s right to control FEDC in state court.

¹⁷ Email from Curtis V. Murphy to Federal Communications Commission, dated June 3, 2005 (“Murphy Email”).

¹⁸ Letter from Scott Elliott to James D. Bradshaw, Audio Division, Media Bureau, dated June 9, 2006.

¹⁹ *Id.* at 2. With respect to Flats 2, the Flats 1 supplement stated: “Of the five members of the board that Curtis Murphy says constitutes his organization, there is only one member who was ever affiliated with [FEDC]. That is Charles Johnson. The last meeting of the [FEDC] board that Charles Johnson attended was Oct. 22, 2000 after which he quit and never returned.” *Id.* at 1.

²⁰ *Id.* at 1.

²¹ FEDC minutes for September 17, 2000, listing the participants as Mr. Johnson, Ms. Smith, Ms. Harper, Mr. Murray, Mr. Kelly, Kenneth Harper, and Mr. Turner.

²² FEDC minutes for January 30, 2001, listing the participants as Ms. Harper, Ms. Smith, Lucy Wright, Kenneth Harper, George Wysinger, Mr. Kelly, Teresa Kelly, Jo Etta Davis, and Ron Singleton. Ms. Smith was voted in as President of FEDC at that meeting, but she submitted her resignation to FEDC on March 4, 2001. See Memorandum from Joyce Smith to Executive Board, dated March 4, 2001.

²³ Mr. Murphy provided a copy of the second page of the Flats 2 Minutes, containing only the resolution appointing Mr. Murphy as General Manager of WVBH-LP. Murphy Letter, Attachment 6. He did not provide the first page of those minutes, which lists the participants and corroborates the attempt at a wholesale appointment of a new FEDC Board of Directors by Flats 2. Compare Murphy Letter, Attachment 6, with Flats 2 Minutes; see also Mr. Murphy’s November 12, 2004 filing of FEDC annual reports with DLEG, showing a complete change in FEDC’s Board of Directors (except for Mr. Johnson) between 2003 and 2004. Mr. Murphy has never made any showing about notice to the FEDC Board of Directors of the meeting reflected in the Flats 2 Minutes.

Discussion. Section 310(d) of the Communications Act of 1934, as amended (the “Act”) states: “No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”²⁴ The determination as to whether a licensee has undergone a transfer of control is made on a case-by-case basis, taking into account the facts presented in a particular case.²⁵ In the case of a non-profit entity with a self-perpetuating board of directors, such as FEDC, the Commission distinguishes between gradual or evolutionary changes in the composition of the board of directors and sudden changes. A sudden change in the composition of the board is a “substantial” change that requires prior Commission approval pursuant to a “long form” application for consent to transfer of control.²⁶ A gradual or evolutionary change in the membership of a self-perpetuating board of directors is considered, at most, a non-substantial change. Although the Commission issued a notice of inquiry on this issue a number of years ago, it has not imposed sanctions on noncommercial licensees that do not apply for consent to such a non-substantial change.²⁷

Flats 1 contends that it is the legitimate successor to Original Flats as the FEDC Board of Directors. Although there has been a complete change in the composition of the directors from the members of Original Flats, Flats 1 presents itself as the legitimate board as a consequence of gradual changes in board membership over a period of years.²⁸ The record in this proceeding shows that Mr. Kelly, a member of Original Flats, served as a leader of Flats 1 prior to his death in 2006.²⁹ Flats 2, on the other hand, contends that FEDC was dissolved by DLEG while under the control of Original Flats and then reactivated in 2004 with Flats 2 as the FEDC Board of Directors.³⁰

By its own presentation of relevant facts, Flats 2 establishes that its claim to the WVBH-LP station license is invalid. Flats 2 never sought or obtained Commission approval for a wholesale change in FEDC’s Board of Directors, so it “has no legitimate claim” to the station’s license.³¹ Although the involvement of Mr. Johnson, a member of Original Flats, in Flats 2 may have induced a belief that Flats 2 had some legitimate right to pursue and assume control of FEDC, such an assumption of control clearly

²⁴ 47 U.S.C. § 310(d).

²⁵ See *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 442 (D.C. Cir. 1985).

²⁶ See *Black Television Workshop of Los Angeles*, 8 FCC Rcd at 4196.

²⁷ See *Transfers of Control of Certain Licensed Non-Stock Entities*, Notice of Inquiry, 4 FCC Rcd 3403 (1989); *Pacifica Foundation*, Memorandum Opinion and Order, 41 FCC 2d 71, 72 (Rev. Bd. 1973) (uncertainty exists as to the extent to which the requirements of Section 310(d) apply to gradual changes in the board of directors of a non-profit licensee).

²⁸ See Flats 1 supplement, dated June 9, 2006, at 2.

²⁹ For instance, Mr. Kelly oversaw the process of obtaining a construction permit and license to relocate WVBH-LP from 711 E. Britain Street to 78 Wall Street in 2004-05, as Flats 1 attempted to re-take control of WVBH-LP from Flats 2. See Letter from Charles D. Kelly to Norm Miller, Audio Division, Media Bureau, dated November 8, 2004 (expressing thanks for expediting the relocation of the station).

³⁰ Murphy Letter at 1-2.

³¹ See note 4 *supra*.

would require a long form application to the Commission and approval of that application.³² Because that never happened, Flats 2 is an interloper that is not approved to operate WVBH-LP.

The dissolution of FEDC in 2003 for failure to file annual reports with DLEG, which Flats 2 presents as the linchpin to its claim to the license, is irrelevant here. The licensee's record of compliance with state law requirements is not germane to our analysis of whether there has been an unauthorized transfer of control of the licensee.³³ The second linchpin presented by Flats 2 is the claim that Flats 1 formed a new organization with a different name than FEDC. However, this claim is neither credible nor candid.³⁴ The context of all the records in question, including the Murphy Email, makes it clear that both Flats 1 and Flats 2 were fighting for control of FEDC. We will not attach any weight to minor inconsistencies in references to FEDC's corporate name.

In order to corroborate the corporate documentation presented by Flats 1 to support its claim to the WVBH-LP station license, the Audio Division sought the views of the members of Original Flats to determine whether they consider the members of Flats 1 as the legitimate FEDC Board of Directors. Although not all members of Original Flats could be reached, Mr. Turner, Ms. Gross-Johnson, Ms. Harper, Ms. Smith and Ms. Sisson (5 of the 9 living members of Original Flats) each indicated that Flats 1 is the legitimate FEDC Board of Directors. Accordingly, we accept Flats 1 as the current FEDC Board of Directors and the appropriate party to control WVBH-LP.

We hereby give Flats 2 notice that it must immediately discontinue operation of WVBH-LP so that Flats 1 may assume control of the station. Continued operation of WVBH-LP by Flats 2 after it receives this letter will subject each member of Flats 2 to a notice of apparent liability for forfeiture for willful and continuing violations of Section 310(d) of the Act³⁵ and 47 C.F.R. § 73.3540.

We also instruct Flats 1 to file an application (FCC Form 318) for minor modification to operate WVBH-LP at a location chosen by Flats 1 and an application (FCC Form 316) for a non-substantial transfer of control of FEDC or assignment of the WVBH-LP license.³⁶

Conclusion. ACCORDINGLY, IT IS ORDERED, pursuant to the authority delegated under 47 C.F.R. § 0.283:

(a) That Scott Elliott, Teresa Kelly, Rich Ray, Rich Hensel, James Childs, Ron Singleton, and Greg Cleveland are deemed to be the current Board of Directors of Flats Economic Development Corp., the licensee of WVBH-LP, Benton Harbor, Michigan;

³² Although Mr. Johnson clearly was a member of Original Flats, his involvement in FEDC from 2001-03 is open to question. Flats 1 claims that he quit Original Flats in 2000. The FEDC corporate records provided by Flats 1 show no involvement by Mr. Johnson after September 17, 2000. Flats 2's annual reports for FEDC for 2001-03 list Mr. Johnson as a member of FEDC's Board of Directors in all of those years.

³³ See, e.g., *Fatima Response, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 18543, 18544 (1999) (the Commission has generally declined to consider issues of a licensee's compliance with the requirements of state corporate law where no challenge has been made in state court).

³⁴ Murphy Letter at 2.

³⁵ 47 U.S.C. § 310(d).

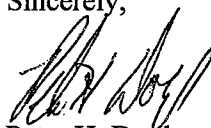
³⁶ Given the confused state of FEDC's corporate records, Flats 1 may prefer to form a new non-profit, non-stock corporation to serve as the licensee of WVBH-LP.

(b) That Curtis V. Murphy, Charles Johnson, Joel Patterson, Archie Davis, and Helen Mitchell are not authorized to control or operate WVBH-LP, Benton Harbor, Michigan;

(c) That Flats Economic Development Corp. shall file a minor modification application on FCC Form 318 to operate WVBH-LP at a location chosen by the current Board of Directors of Flats Economic Development Corp. within 60 days; and

(d) That Flats Economic Development Corp. shall file an application for consent to a non-substantial transfer of control or assignment of license of WVBH-LP to reflect control of the station by the current Board of Directors of Flats Economic Development Corp. within 60 days.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Mr. Charles Johnson
Mr. Joel Patterson
Mr. Archie Davis
Ms. Helen Mitchell