

## Character Qualifications

Questions relating to the character qualifications of the assignor were raised in a previous proceeding in which the FCC took no substantive action.

Specifically, this matter relates back to a period over thirteen years ago, when Barry Wood dba Baldwin Broadcasting Company ('Wood') held a permit from the FCC for construction of what was then an unbuilt radio station, WFMI, 106.5 MHz, allocated to Bay Minette, Alabama. On December 30, 1992, Wood hired William H. Phillips, who was then unemployed, to manage WFMI, pursuant to a fully integrated Employment Agreement. (Appendix A hereto.) Within five months, WFMI began broadcasting. The following year, the station upgraded its facilities and changed call letters to WAVH. In 1995, the FCC changed the city of license of WAVH to Daphne, Alabama. In 1998, Wood acquired a second station, WZEW, Fairhope, Alabama. (WAVH and WZEW are referred to herein as the "Stations.") At various times between 1997 and 1999, Wood and Phillips discussed various scenarios under which Phillips might, subject to prior FCC approval, acquire an ownership interest in the Stations, but no agreement to that effect was ever reached.

On September 13, 1999, after discovering that Phillips had committed numerous breaches of the Employment Agreement, Wood terminated Phillips' employment. Phillips then sued Wood in the Circuit Court of Mobile County, Alabama under multiple theories, including (a) an attempt to enforce the Employment Agreement on the premise that Phillips was due additional incentive bonuses; (b) a claim that Wood had promised that he would make Phillips a partner, but had fraudulently refused to do so; and (c) a story that under an alleged oral partnership, Phillips supposedly already held an ownership interest in the Stations.

Extensive litigation ensued, the details of which are too tedious to recite here. However, the essence of the litigation is as follows: At trial before a jury in the spring of 2001, Phillips dropped his claim under the Employment Agreement, and focused on the mutually exclusive theories that he was a partner, or was not a partner but should have been. Eventually the Circuit Court issued a judgment, on July 18, 2001, holding in favor of Wood on the fraud claim, but finding that Phillips had become a 40% partner in "Baldwin Broadcasting Company" in December, 1992. The Circuit Court made this part of its judgment final, allowing Wood to appeal the determination of Phillips' status as a partner.

Going beyond anything the jury had specifically said, the Circuit Court judge also held that the entity in which Phillips was deemed to be a *partner actually owned the Stations*, in spite of the clear FCC record showing that the Stations were licensed to Wood's sole proprietorship. The trial court made this part of its judgment non-final. Accordingly, Wood then sought reconsideration of the holding that the supposed partnership al-

ready owned the Station licenses. In that petition, which was never acted on, Wood contended that such judgment improperly invaded the jurisdiction of the FCC.

The Circuit Court, as a function of its findings that the perceived partnership owned the Stations, and that Wood had dissolved the partnership when he fired Phillips, ordered a “winding-up” of the partnership, notwithstanding the pendency of Wood’s appeal. Under Alabama law, such winding-up required a sale of the assets. Therefore, Wood proposed an auction sale of the Stations. The auction was held on May 2, 2002 in the United States Bankruptcy Court for the Eastern District of Virginia (the “Alexandria Court”). At the beginning of the hearing that immediately preceded the auction, Wood was presented with a Settlement Agreement with Phillips that Wood’s counsel had signed without Wood’s knowledge or authorization a few hours earlier. Even though counsel had done so with good intentions, Wood found certain aspects of the Settlement Agreement to be problematic. Wood proposed a number of changes to the Settlement Agreement, but, in order to avoid derailing the auction, gave the changes to counsel for Phillips for later consideration. The high bidders at the auction were Cumulus Broadcasting, Inc. and .com+, l.l.c., who collectively outbid market competitor WABB-FM, Inc. (“WABB-FM”). Wood’s changes to the Settlement Agreement were never effectuated.

Wood and the buyers then filed applications (FCC File Nos. BALH-20020522AAJ and BALH-2002522AAK -- the “Assignment Applications”) to assign the licenses for the Stations to Cumulus Licensing, Inc. and .com+ l.l.c., respectively.

On July 11, 2002, WABB-FM filed a petition (the “Petition”) to deny the Assignment Applications. In the Petition, WABB-FM argued, *inter alia*, that Wood and Phillips had concealed the existence of the “partnership” from the FCC, and that the Settlement Agreement served to confirm the secret partnership. On that basis, WABB-FM suggested that WAVH and WZEW should be thrown into a revocation proceeding. The Petition relied in large measure on the July 18, 2001 judgment of the Circuit Court mentioned above. That judgment was, however, subsequently reversed by the Alabama Supreme Court in *Wood v. Phillips*, 849 So.2d 951, 959-60 (2002).

The Supreme Court, in its decision, held that the parol evidence rule barred consideration of testimony in which Phillips attempted to spin the Employment Agreement as a “guised” partnership agreement, and otherwise contended that he was Wood’s partner from the outset. After stripping out the improper parol evidence, the Supreme Court concluded that the trial court’s judgment was not supported by substantial evidence, and must therefore be set aside. Nevertheless, the Supreme Court left open, on remand, the narrow issue whether a partnership owning something might have arisen at some point after Phillips executed his Employment Agreement.

Eventually, the FCC’s Audio Division sent the parties a letter, dated April 23, 2003 (the “Request”). The Request included questions about the judgment of the Ala-

bama trial court and about the Settlement Agreement. Wood responded to the Request by advising the FCC of the decision in Alabama on appeal and by addressing the issues posed by the Settlement Agreement.

After the passage of another year or more, the buyers terminated the 2002 Asset Purchase Agreements. The parties advised the FCC of this development. The agency then dismissed the Assignment Applications without any ruling on the merits of the Petition.

Subsequently, the Settlement Agreement terminated by its own terms, as recognized by order of the Alexandria Court dated May 23, 2005. (Appendix B hereto.) The parties have thus been returned to the Alabama litigation. However, the mere pendency of a claim such as that which Phillips retains does not form a proper basis on which the FCC could find that a party lacked the requisite character qualifications.

If the Petition had raised a substantial material question of fact, the FCC might feel bound to consider it in the context of the instant application. However, in light of the decision by the Alabama Supreme Court to set the judgment of the trial court aside, there is no cognizable support for the notion that a Wood-Phillips partnership somehow “owns” the Stations.

The following points summarize why the FCC should not view the Petition as having raised a substantial material question of fact that would impede the sale of WZEW to .com+ l.l.c. They have been discussed in greater detail in Wood’s opposition pleadings, his response to the FCC’s Request, and letters filed in connections with the WZEW license renewal application on or about August 19, 2005 and September 28, 2005, all of which are incorporated herein by this reference.

Phillips' own bare testimony is too self-serving and contradictory to be taken seriously by the FCC in this context. Curiously, before it became convenient for Phillips to make up testimony about a partnership with Wood, he had actually told the truth about the relationship. Thus, on June 20, 1996, Phillips swore under oath that Baldwin Broadcasting Company was a proprietorship 100% owned by Wood. See Appendix C hereto (excerpts from deposition given by Phillips in Page-Mart litigation).

Phillips' post-firing insistence that he had been a partner from the beginning represents an impermissible attempt to vary the terms of his Employment Agreement, which states clearly that Baldwin Broadcasting Company is a 'sole proprietorship.' Agreement at 1. Even though the Employment Agreement contained certain incentive salary provisions, it specified that it did ‘not create a partnership between the parties.’ *Id.* at 10. Further, in the Alabama litigation Phillips testified that he never claimed ownership through a partnership of equity percentages in the Stations over and above the percentages that were contained in the incentive salary provisions of the Employment Agreement. Given

that the Alabama Supreme Court has restored the integrity of the Employment Agreement, that means that at most Phillips would have been a “partner” with a percentage interest equal to zero.

Finally, as noted above, in the 2002 Petition, WABB-FM attempted to find support in the 2002 Settlement Agreement for its arguments of concerning a supposedly concealed partnership. However, Wood had never endorsed the provisions of that Settlement Agreement that WABB-FM viewed as offensive to the FCC’s authority, and the Settlement Agreement has since collapsed. Beyond the settlement document itself, WABB-FM never presented any evidence of a nature that the FCC could find reliable (i.e., a first-hand knowledge affidavit or anything bearing Wood’s signature) that would demonstrate that Wood ever imagined, considered or conceded that any partnership had a claim to the FCC licenses. (The prospective and inchoate “tax partnership” contemplated briefly in 1997 is not to the contrary, as Wood specified at the time that such partnership, even if it were formed, would not hold the FCC licenses.) Thus, the elimination of the Settlement Agreement has removed the last vestige of potential concern with regard to any such 'partnership.'

Accordingly, the character allegations leveled in the Petition are not supported by any material determination of significance to the FCC under its Character Policy Statement. They therefore present no impediment to the grant of the instant application to assign the licenses for WZEW to .com+ l.l.c.