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Closed Broadcast Auction 88

Re: New (FM), Traverse City, MI
Facility ID No. 65931
File No. BPH-19941020MH

**Application for New FM Station
Construction Permit**

Dear Counsel:

We have before us Good News Media, Inc.'s ("Good News") Petition to Deny ("Petition") the application of The MacDonald Broadcasting Company ("TMBC") for a new FM construction permit at Traverse City, Michigan.¹ For the reasons stated herein, we deny the Petition.²

Background. In 1994, TMBC filed an application for the FM Allotment on Channel 283A at Traverse City. The TMBC application was mutually exclusive with one filed by Good News,³ and with four other applications.⁴ The Traverse City applications were part of a group of FM applications that were in pending, closed groups since the transition to competitive bidding in the late 1990s.⁵ The

¹ File No. BPH-19941020MH.

² Also before us are TMBC's September 17, 2010, Opposition and Good News's September 29, 2010, Reply. Additionally, Good News filed a Supplement to Petition to Deny ("Supplement") on December 2, 2010, with TMBC filing a Response on December 8, 2010, and Good News filing a Reply on December 16, 2010. The Supplement and the pleadings responding to it will be addressed below.

³ File No. BPH-19941020MB.

⁴ Other mutually exclusive applications were filed by Interlochen Center for the Arts (File No. BPED 19941020MN), WTCM Radio, Inc. (File No. BPH-19941020MI), Salija Bokram / Michael J. St. Cyr (File No. BPH-19941020MF), and Central Michigan University (File No. BPH-19941019MA).

⁵ See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15950-52 ¶¶ 80-87, 15958-61 ¶¶ 105-111, FCC 98-194 (1998) ("*Broadcast First Report and Order*"), on recon., Memorandum Opinion and Order, 14 FCC Rcd 8724, on further recon., Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

mutually exclusive (“MX”) group comprised both commercial and noncommercial educational (“NCE”) applicants. Because NCE stations are not subject to competitive bidding,⁶ these pending, closed “mixed” MX groups remained frozen until the Commission established procedures for their resolution.⁷ Pursuant to public notice, Good News amended its application in order to participate in the auction.⁸

In 2010, both Good News and TMBC filed Form 175 applications to participate in Auction 88.⁹ Both applicants were found qualified to bid despite changes in their management and ownership structures from their original 1994 applications. In particular, TMBC disclosed that shareholder Kenneth W. MacDonald, Jr. (“MacDonald”), who in 1994 was TMBC’s single largest shareholder with 29.07 of the company’s stock, now owned 93.6 percent of TMBC. TMBC was the provisional winning bidder in the auction for the Traverse City permit, and timely amended its original FCC Form 301. Good News filed the Petition, urging that TMBC was unqualified to bid in Auction 88 as there had been a major change in ownership between its original 1994 application and its Auction 88 Form 175 application.

Discussion. *Good News Petition.* A major change in ownership is defined as any change in which the original party or parties to the application do not retain more than 50 percent ownership interest in the application as originally filed.¹⁰ When TMBC filed its original Traverse City application in 1994, as noted above MacDonald was the single largest shareholder of TMBC, owning 29.07 percent of the corporation’s stock. Substantial blocks of stock were also owned by MacDonald’s mother Carolyn Ann MacDonald and the *Inter Vivos* Trust for his father, Kenneth W. MacDonald (21.275 percent each), with MacDonald’s sister Patricia MacDonald Garber (“Garber”) and brother Andrew MacDonald each holding 14.19 percent of the corporation’s stock. No one individual owned more than 50 percent of the company’s stock.

In the Petition, Good News states that in 2001 MacDonald “suddenly [bought] out the other shareholders in the corporation and [took] control,”¹¹ thereby “seizing control over the [TMBC] broadcasting empire through the ownership of 98 percent of its voting stock.”¹² We find that Good News’s factual claim is inaccurate. TMBC in fact filed an application for transfer of control of the five licenses it owned.¹³ In the TMBC Transfer Application, TMBC explained that the corporation had repurchased the stock held by Carolyn Ann MacDonald and the Kenneth W. MacDonald *Inter Vivos* Trust upon the retirement of MacDonald’s parents. The stock was not purchased by MacDonald himself. As a

⁶ 47 U.S.C. § 309(j)(2)(C).

⁷ See *Reexamination of the Comparative Standard for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691 (2003) (“*NCE Second R&O*”), *recon. granted in part*, Memorandum Opinion and Third Order on Reconsideration, 23 FCC Rcd 17423 (2008) (“*MOTOR*”).

⁸ *Window Opened to October 30, 2009, to Permit Amendment of Applications for Noncommercial Educational Stations in Pending, Closed Mixed Groups*, Public Notice, 24 FCC Rcd 12188 (MB 2009) (“*October 2009 NCE Amendment Public Notice*”).

⁹ *Closed Auction of Broadcast Construction Permits Scheduled for July 20, 2010 – Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 88*, Public Notice, 25 FCC Rcd 2942 (MB/WTB 2010).

¹⁰ 47 C.F.R. § 73.3573(a)(1).

¹¹ Petition at 5.

¹² *Id.* at 4.

¹³ The lead file was File No. BTC-20010713AAB (“TMBC Transfer Application”). The stations involved were WSAM(AM) and WKCQ(FM), Saginaw, Michigan; WEEG(FM), Essexville, Michigan; and WILS(AM) and WHZZ(FM), Lansing, Michigan.

result of the corporate stock repurchase, MacDonald became the majority shareholder, as his holdings comprised a larger percentage of the now-smaller amount of outstanding TMBC stock.¹⁴

Under either factual interpretation, however, legally the TMBC transaction represented a transfer of control of the corporation to MacDonald, but not a major change in ownership. The gravamen of Good News's Petition is its contention that the alleged major change in TMBC's ownership between 1994 and 2010 required the assignment of a new file number to the TMBC application and, thus, its dismissal as being untimely filed.¹⁵ However, MacDonald and Garber, the two currently attributable shareholders in TMBC, are both original parties to the application who, taken together, own well more than 50 percent of TMBC's outstanding stock. Although no individual or entity owned more than 50 percent of TMBC prior to the TMBC Transfer Application, "a minority interest party may become a majority interest party without engaging in a major change so long as the party or parties to the application at the time of original filing retain more than 50 percent of the ownership interests."¹⁶ Here, it is undisputed that over 50 percent of TMBC's outstanding stock is in the hands of two of the original parties to the application. Therefore, no major change has taken place, the TMBC application need not be assigned a new file number and dismissed as untimely,¹⁷ and the Petition is without merit and is denied.¹⁸

Good News Supplement. On December 2, 2010, Good News filed its Supplement, calling our attention to an *ex parte* presentation to the Commission from Rep. Dave Camp of Michigan, initiated with his office by an inquiry from Garber. The Congressman's letter to the Commission included a Privacy Release Statement, in which Garber summarized TMBC's position in opposition to the Petition. As Congressman Camp's letter and attachment were not served on Good News or its counsel, the Commission's Office of General Counsel ("OGC") sent Congressman Camp a November 22, 2010, letter, explaining that the communication was *ex parte*, and that accordingly, "copies of [the letter and attachment] have been placed in a public file associated with, but not made part of, the record in the proceeding, and therefore cannot be considered."¹⁹ The OGC letter was served on Good News, which appended a copy of that letter, including the attached documents from Congressman Camp's office, to its Supplement.²⁰

¹⁴ Likewise, MacDonald's sister Garber's percentage of stock ownership more than doubled, from one percent to 2.44 percent.

¹⁵ Petition at 6-8. See 47 C.F.R. §§ 1.2105(b) (prohibiting major amendments to short-form applications), 73.3522(a)(3) (prohibiting major amendments to long-form applications).

¹⁶ *International Broadcast Consultants, Inc., Alegria I, Inc., Elizabeth Waters, Phyllis Moore, Gloria McKinley, and Verna Rolls, d/b/a Heritage Communications*, Memorandum Opinion and Order, 102 F.C.C.2d 254 (Rev. Bd. 1985) ("*International Broadcast Consultants*"). We note that the Review Board's statement in this case does not mean that all of the original shareholders must retain an interest. In *International Broadcast Consultants*, one original party, who owned 26 percent of Alegria I, Inc. at the time of the initial application, owned no stock at the time of amendment four years later. As long as over 50 percent of the applicant corporation remains in the hands of an original party or parties, no major change has taken place.

¹⁷ 47 C.F.R. § 73.3573(f)(2)(i).

¹⁸ Although Good News also complains that TMBC did not amend its Traverse City application, as required by 47 C.F.R. § 1.65, it fails to point out how it or any other applicant was prejudiced by an alleged lack of knowledge of changes in TMBC's ownership structure, especially considering that TMBC fully disclosed this information in the 2001 TMBC Transfer Application.

¹⁹ *The Honorable Dave Camp, Member, U.S. House of Representatives*, Letter (OGC Nov. 22, 2010).

²⁰ See Supplement, Exhibit A.

Good News argues that what it terms TMBC's "devious and calculated attempt to subvert the Commission's adjudicatory process," should be "deemed to be one additional 'nail in the coffin' of the [TMBC] application."²¹ TMBC responds that Garber merely asked Congressman Camp to inquire as to the status of the TMBC application, and did not intend that the Congressman send a copy of the Privacy Release Form to the Commission.²² TMBC's account is supported by a letter from Congressman Camp attached to TMBC's Response to the Supplement.²³

It is, of course, a violation of the Commission's Rules for parties to a restricted proceeding such as this to make *ex parte* presentations to Commission decision-making personnel regarding the merits of the proceeding.²⁴ However, the mere fact that *ex parte* communications have taken place does not automatically invalidate a party's position in the proceeding. Rather, the standard is whether such alleged *ex parte* contacts irrevocably tainted the agency's decision-making process so as to make the ultimate judgment of the agency unfair.²⁵ Among the salient factors discussed by the *Freeman* court, in determining whether an *ex parte* contact irrevocably taints the decision-making process, are the gravity of the communications, whether the contacts may have influenced the agency's decision-making process, whether the party making the contacts benefited from the ultimate decision, and whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond.²⁶

We find that Congressman Camp's communication has not tainted our decision-making process. The letter came to the Commission through its Office of Legislative Affairs, which sent it to the Media Bureau solely for determination as to whether it represented an improper *ex parte* presentation. Having made this determination, the Media Bureau sent the communication to OGC for response under established Commission procedures. At no point were the merits of any statements contained in the letter or attachments considered. Importantly, and as OGC made clear in its letter, the Congressman's inquiry was not made a part of the record. In fact, the only reason these documents are now part of the record is because Good News received them and then attached them to its own pleadings. Clearly Good News cannot claim it was unaware of the contents of the communications, or that it had no opportunity to respond. Finally, Garber's statement in the Privacy Release Form merely summarizes TMBC's opposition to the Petition, thus it does not expand upon the facts and arguments already in the record. Accordingly, we find that the *ex parte* contact does not taint our decision-making process in this matter, and does not compel a change in our above-announced decision regarding the Petition.

TMBC Traverse City Application. We have examined TMBC's application, and find TMBC to be fully qualified to be a Commission licensee, and that grant of the application is in the public interest, convenience, and necessity. We therefore grant the application.

²¹ Supplement at 8.

²² Response to Supplement at 2-3.

²³ *Id.*, Exhibit 2.

²⁴ 47 C.F.R. § 1.1208.

²⁵ *Freeman Engineering Associates, Inc. v. F.C.C.*, 103 F.3d 169, 184 (D.C. Cir. 1997) ("*Freeman*").

²⁶ *Id.*

Conclusion: Accordingly, the Petition to Deny filed by Good News IS DENIED. The application of The MacDonald Broadcasting Company for a new FM broadcast construction permit at Traverse City, Michigan, File No. BPH-19941020MH, IS GRANTED.

Sincerely,

Risa Scanlan

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Chief, Audio Division
Media Bureau