



Federal Communications Commission
Washington, D.C. 20554

August 1, 2011

In Reply Refer to:
1800B3-MIE
Released: August 1, 2011

The Community Advisory Board of WXEL
c/o Mr. Bill Rautenberg, Chairman
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In re: **WXEL(FM), West Palm Beach, Florida**
Facility ID No. 58363
File No. BALED-20101228AAS

Petition for Reconsideration

Gentlemen:

We have before us a June 13, 2011, Petition for Reconsideration ("Petition") filed by the Community Advisory Board of WXEL ("CAB"). The Petition requests reconsideration of the May 16, 2011, letter decision¹ ("*Letter Decision*") granting an application to assign the license for noncommercial educational ("NCE") Station WXEL(FM), West Palm Beach, Florida ("Assignment Application"), from Barry Telecommunications, Inc. ("Barry") to Classical South Florida, Inc. ("CSF").² For the reasons set forth below, we deny the Petition.

Background. Barry and CSF filed the Assignment Application on December 28, 2010. The Assignment Application drew multiple petitions to deny and informal objections, including a petition to deny filed by CAB on February 3, 2011.³ In its *Letter Decision*, the Media Bureau ("Bureau") denied the petitions to deny and informal objections, and granted the Assignment Application.⁴

¹ *Letter to SOS-WXEL, et. al.*, ref. 1800B3-SLW (MB May 16, 2011).

² Also before us is an Opposition to Petition for Reconsideration ("Opposition"), filed June 24, 2011, by Barry.

³ See *Letter Decision* at 1-2.

⁴ *Id.* at 6.

CAB now seeks reconsideration of the *Letter Decision*, asserting that it erroneously concluded that Barry engaged in “arms-length negotiations with all potential acquirers.”⁵ CAB asserts that Barry did not consider assigning the Station to any party other than CSF, and that the arrangement with CSF was strictly a “closed-door” transaction.⁶ It further claims that Barry’s assertion that it had engaged in arms length transactions constituted a misrepresentation to the Commission. CAB requests that the Bureau vacate the *Letter Decision* and designate the matter for a hearing.⁷

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission’s original order, or raises additional facts, not known or existing at the time of the petitioner’s last opportunity to present such matters.⁸ Petitions for reconsideration which rely on facts not previously presented to the Commission may be granted if the Commission determines that consideration of the facts relied on is required in the public interest.⁹ As discussed below, CAB has not met this standard.

CAB essentially takes issue with the fact that Barry did not consider the Community Broadcast Foundation (“CBF”) or the Strategic Broadcast Media Group (“SBMG”) as potential assignees. However, Section 310(d) of the Communications Act of 1934, as amended (“Act”), provides that the Commission “may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”¹⁰ To the extent any party seeks to present itself or another entity as a superior potential buyer of a station for any reason, we find that Section 310(d) prohibits the Bureau from considering that issue. Furthermore, the Commission has consistently held that it is not the proper forum for the resolution of private disputes.¹¹ Any private dispute as to why an assignor chose one assignee over another will not be resolved by the Commission. Thus, CAB has failed to show that the *Letter Decision* was in error.

CAB also contends that Barry “provided false and misleading information to the FCC.”¹² Misrepresentation is a false statement of fact made with an intent to deceive the Commission.¹³ In

⁵ Petition at 2.

⁶ *Id.* at 3. CAB supports these allegations with declarations of potential acquirers who CAB claims were not given the opportunity for “arms length negotiations.” See Exhibits 1-7.

⁷ *Id.* at 1.

⁸ See 47 C.F.R. § 1.106(c) and (d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

⁹ See 47 C.F.R. § 1.106(c)(2). See also *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Scranton and Surfside Beach, South Carolina)*, Memorandum Opinion and Order, 4 FCC Rcd 2366 (MB 1989).

¹⁰ 47 U.S.C. § 310(d).

¹¹ See *John F. Runner, Receiver (KBIF)*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976); *Decatur Telecasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 8622 (1992).

¹² Petition at 6.

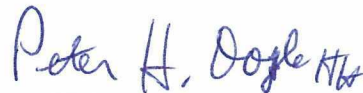
¹³ See *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983). In this case, as discussed above, the Bureau was prohibited from considering other potential assignees. Thus, whether or not Barry engaged in negotiations with other parties was not relevant to the Bureau’s determination of whether the proposed assignment was in the public interest. However, misrepresentation may involve immaterial matters. See *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946) (a “willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well (continued . . .)

support of its contention, CAB cites to the following language in the *Letter Decision*: “Barry asserts that the transaction took place following extensive arms-length negotiations with all potential acquirers.”¹⁴ CAB claims that this assertion is false because Barry did not negotiate with CBF or SBMG.

We disagree. While the Bureau characterized Barry’s activities as “arm’s length negotiations with all potential acquirers,” this sentence does not accurately reflect Barry’s statement in its Opposition to Petition to Deny. There, Barry asserted that the final purchase price of WXEL(FM) was “based upon the marketplace and involved extensive arms-length negotiations between the parties.”¹⁵ By “parties,” Barry apparently was referring to itself and CSF, and not “all potential acquirers.” Therefore, we find no evidence that Barry was deceptive in its statements before the Commission. Thus, we find no evidence of misrepresentation and therefore no basis to designate the matter for hearing.

Conclusion/Actions. For the reasons discussed above, the Petition for Reconsideration filed by the Community Advisory Board of WXEL on June 13, 2011, IS DENIED.

Sincerely,

A handwritten signature in blue ink that reads "Peter H. Doyle" with a stylized flourish at the end.

Peter H. Doyle
Chief, Audio Division
Media Bureau

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as by material and persuasive ones”). Accordingly, we must consider the misrepresentation claim, even though it involves a matter that was not relevant to our review of the underlying sale transaction.

¹⁴ *Letter Decision* at 5.

¹⁵ Opposition to Petition to Deny at 8.