

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

| | | |
|--|---|------------------------|
| In the Matter of |) | |
| |) | |
| Attempt by First State Bank of the Southeast |) | |
| to Effectuate a Premature and Unauthorized |) | |
| Assumption of Control of Choice Radio Corp- |) | |
| oration, Licensee of Radio Broadcast Stations |) | |
| |) | |
| WYWY(AM), Barbourville, Kentucky |) | FCC Facility ID 3953 |
| WKKQ(FM), Barbourville, Kentucky |) | FCC Facility ID 3954 |
| W227CD, Barbourville, Kentucky |) | FCC Facility ID 158017 |
| W283AI, Mount Vernon, Kentucky |) | FCC Facility ID 155775 |
| WWXL(AM), Manchester, Kentucky |) | FCC Facility ID 72441 |
| WTBK(FM), Manchester, Kentucky |) | FCC Facility ID 39774 |
| |) | |
| from Jonathan Smith, holder of 100% of the |) | |
| Licensee's voting stock, in order to Pursue a |) | |
| Second Premature, Unauthorized Transfer of |) | |
| Control of Choice Radio Corporation to Karen |) | |
| Davenport, Special Commissioner, to be |) | |
| whitewashed 15 some months <i>post facto</i> via |) | |
| a Transfer Application on Schedule 316 |) | File No. 0000135150 |
| |) | |
| and |) | |
| |) | |
| An Application on Schedule 314 for FCC |) | File No. 0000135218 |
| Consent to the Assignment of the Licenses of |) | |
| Radio Broadcast Stations |) | |
| |) | |
| WYWY(AM), Barbourville, Kentucky |) | FCC Facility ID 3953 |
| WKKQ(FM), Barbourville, Kentucky |) | FCC Facility ID 3954 |
| W227CD, Barbourville, Kentucky |) | FCC Facility ID 158017 |
| W283AI, Mount Vernon, Kentucky |) | FCC Facility ID 155775 |
| WWXL(AM), Manchester, Kentucky |) | FCC Facility ID 72441 |
| WTBK(FM), Manchester, Kentucky |) | FCC Facility ID 39774 |
| |) | |

| | | |
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| to |) | |
| |) | |
| Roy Jaynes Broadcasting LLC |) | |
| |) | |
| in Conflict with the Applications of |) | |
| |) | |
| Choice Radio Corporation |) | |
| |) | |
| For FCC Consent to Assignment of License of |) | File No. BALH-20200903AAL |
| Radio Broadcast Station WTBK(FM), |) | |
| Manchester, Kentucky, to |) | |
| |) | |
| Manchester Communications, Inc. |) | |
| |) | |
| and of |) | |
| |) | |
| Manchester Communications, Inc. |) | File No. BALH-20200903AAN |
| |) | |
| For Consent to Assignment of License of |) | |
| Radio Broadcast Station WTBK(FM), |) | |
| Manchester, Kentucky, to |) | |
| |) | |
| Strategic Impact Marketing Consulting Corp. |) | |
| Attention: Audio Division, Media Bureau | | |

PETITION TO DENY

Strategic Impact Marketing Consulting Corporation (“Strategic” or “SIMCC”), Choice Radio Corporation (“Choice”) and Jonathan Smith (“Smith”) (collectively, “Petitioners”), by counsel, hereby Petition to Deny the captioned Assignment Application filed on Schedule 314 at the behest of First State Bank of the Southeast (“FSB” or “the Bank”) to assign Choice’s FCC licenses to Roy Jaynes Broadcasting LLC (“Jaynes”).

Petitioners also object to the application on FCC Schedule 316 to validate, after the fact,

the Bank's premature assumption of control over Choice whereby the Bank, without prior FCC approval, purported to sell the "assets and stock" of Choice pursuant to what the Bank perceived as its security interest in the FCC licenses of Choice, later gussied up by the appointment on its motion of Karen Davenport as Special Commissioner to further such sale.

This case may, on the surface, seem like a conventional debtor-creditor case. It is not. At issue here is some 87 years of precedent governing the FCC's sole jurisdiction over broadcast licenses and the time-honored principle that a lender may not acquire a security interest in such licenses.

Some aspects of the case were briefed in Strategic's Opposition to Petition to Deny filed last November in the applications for assignment of the license for FM Radio Station WTBK, Manchester, Kentucky first from Choice to Manchester Communications, Inc. ("MCI") and then from MCI to Strategic. The Opposition (incl. the Declarations of Jonathan Smith and Karen Moses) is incorporated herein by this reference.

There, Strategic pointed out that the Security Agreement connected with the Bank's loan to Choice in 2016 included provisions for a pledge of the shares in Choice then held by Jonathan Smith and Karen Moses, and that such pledge did not comply with FCC requirements illuminated in the case law and encapsulated in the Instructions to FCC Form 314. Moreover, Strategic explained that the assets to be covered by such Security Agreement were clearly limited to Choice's Barbourville stations (which were specifically identified by their call signs and Facility Identification Numbers in the text of

an exhibit to the Security Agreement). Choice's owners had pointed out to the Bank at the time that Choice had a pre-existing debt obligation to Manchester Communications, Inc. ("MCI") with regard to the assets of Choice's stations in Manchester, Kentucky, dating from Choice's acquisition of the Manchester stations from MCI.

The applications identified by FCC File Nos. BALH-20200903AAL and BALH-20200903AAN represented Choice's effort at restructuring its debt to MCI. The Bank's petition to deny those applications stemmed from an extremely strained misconstruction of the language of the Security Agreement's exhibit so as to pull the Manchester stations within its ambit. That position was not supported by the affidavit of any Bank officer who was present when the loan was made, alleging that the parties intended the Exhibit to impose security interests on the licenses of the Manchester stations even though they were mentioned nowhere in the loan documentation.

We need not repeat the analysis of Strategic's Opposition to the Bank's Petition to Deny on this issue further, except to point out that the Bank's high-handed actions in this matter are clearly based in a perception that it held a direct security interest in the FCC licenses of Choice, as well as in Choice's equipment and furniture. That view is reflected in the Bank's original Complaint in the Whitley County litigation. A copy of the Complaint is attached as Exhibit A hereto. The Complaint asserted that:

"....Choice....executed to and in favor of FSB, a commercial security agreement dated April 6, 2016 and a pledge agreement dated April 6, 2016 whereby [Choice] **conveyed to FSB a first lien** on 1,000 shares of Choice Radio Corporation stock and all equipment, furniture, fixtures, accounts, inventory, general intangibles including without limitation rights under all contract rights and **all present and**

future authorizations, permits, licenses, franchises, governmental authorizations and permits including debtor's rights under present and future authorizations, permits, and licenses issued or granted to debtor by the Federal Communications Commission for the ownership and operation of stations WKKQ-FM and WYWY and all rights incident or appurtenant to such authorizations, permits, and licenses...." Complaint at paragraph 7.

The original Court order authorizing the Bank to seize the radio station assets (including intangibles such as the station licenses) and "sell the same," and "to market for sale and sell the [Choice Radio Corporation] stock shares to a third party purchaser" was dated May 23, 2019. See Exhibit 3 to the Petition to Deny filed by the Bank last October 13 against the Manchester assignment applications. The Bank had the Court amend that order on November 14, 2019 to add the Manchester stations to the scope of the Bank's repossession mandate, and to authorize the Bank to sign papers on behalf of Choice as its "attorney in fact" in order to applications for FCC consent to the assignment of licenses "or" to the transfer of control of Choice to effect the liquidation of Choice's stock, but nowhere did the Court acknowledge the requirement of FCC case law that the sale of such assets and/or stock may not be made directly by the creditor. Rather, it is necessary for a creditor first to secure the appointment of a receiver, trustee in bankruptcy or other such third party (collectively "Receiver"), *and then such Receiver must seek and secure FCC approval* before exercising control of the licensee corporation to the extent of selling the assets of the stations, or the stock in the licensee, out from under the owner who, as the party previously approved to exercise control of the licensee and the concomitant responsibilities of the licensee to the FCC.

Cavalierly ignoring the requirement that prior to any sale of license the FCC must approve the receiver, the Bank engaged in a half-hearted process of marketing the stock and/or assets of Choice. Petitioners dispute that this was a commercially reasonable sale as required by the FCC. Evidence supporting Petitioners' position is found in the sale price: The contract for Jaynes' purchase of these properties specifies a price of merely \$100,000. This is a patently unreasonable price for a set of stations, including two Class C2 facilities, just one of which had been appraised at the behest of the Bank just a few years prior at a value of over one million dollars.

The assignment application makes no effort to justify the sale as commercially reasonable. It merely states that "FSB has proceeded with its efforts to collect on its Judgment, by a court-approved sale of the Stations..." See "Description of Transaction and Court Orders, attached as an exhibit to the application, at paragraph six. This exhibit fails to own up to the fact that the sale appears to have occurred before Ms. Davenport was appointed as a Commissioner, and that she was not appointed to assume the role of a Receiver (in control of the licensee pursuant to prior FCC authority) but only to "sign certain documents." In other words, it was the Bank (rather than Ms. Davenport) who proceeded with its desultory sale, and this was done before the Bank or Ms. Davenport had FCC approval to do so.

Indeed, there is substantial evidence that the Bank had conducted its sale efforts (such as they were) before Ms. Davenport was ever mentioned in an order of the Kentucky Court. Last August, about two months before the date of the Court Order

purporting to give Ms. Davenport signature authority, one Johnny Pirkle, in a telephone conversation with Karen Moses and Jonathan Smith, asserted that he had bought "all eight" of Choice's stations. While he later changed his story to advise that he was only a "consultant" to the actual buyer, there can be no dispute but that the Bank had already effected its "sale," without an auction (at least without one that Mr. Smith or Mrs. Moses heard anything about).

More recently (on March 4 of this year), Mr. Pirkle again called Mrs. Moses, speaking in terms suggesting his control of the planned operations that would ostensibly be licensed to Jaynes. He said that he would be programming the Choice stations, for example. Among other things, he claimed that Jaynes had sold its station in Georgia, and had the \$100,000 needed to close on his purchase of the Kentucky stations. But if such a sale has happened, we find no evidence of FCC approval for any such transaction in CDBS or LMS. Nor is there any purchase agreement on file in the FCC online public file for the Georgia station.

In light of these conflicting representations, questions are raised whether Roy Jaynes Broadcasting is financially qualified to complete the purchase transaction and operate the Kentucky stations for three months without reliance on advertising revenue. In addition, there is a substantial and material question of fact whether Jaynes' representation to the FCC in the assignment application that it still owns the Georgia station is accurate. If not, a hearing should be held to determine the true facts and circumstances relating to this matter, such as whether he had a motive to conceal the

transaction to which Mr. Pirkle alluded. In addition, considering that Mr. Pirkle, who unquestionably *does* have the financial ability to acquire group of stations in Kentucky (in the wake of his sale of a valuable FM station in the Knoxville market some years ago), and that Mr. Pirkle has been the only one speaking for the alleged buyer in this matter, a question is raised whether he is the real party in interest with respect to the plan to acquire the Choice Radio Corporation stations.

Beyond that, the transaction documents contain certain elements that should prompt the Commission to demand further information from the Bank, Ms. Davenport, Jaynes and Mr. Pirkle. Notably, the “Asset Sale & Purchase Agreement” attached to the Assignment Application is dated December 22, 2020, describes the “Assets” to be assigned as including the same property as mentioned in the Complaint of 2018, *except* that the Manchester stations have been added to the list of licenses to be conveyed, and a sort of “savings clause” has been added after the reference to FCC licenses. The savings clause – to disclaim a security interest in FCC licenses if such is impermissible (as it is) – makes no sense in the context of a sale agreement, or at least a sale agreement based on procedures permitted by the FCC. But since the Bank did not follow normal FCC approved procedures here, what does that clause mean? Does Jaynes, under the contract, not stand to receive an assignment of the licenses because such lien was not “permitted by federal law and FCC rules and policies”?

Further, there is the troubling aspect that Jaynes is to buy not only the hard assets and (perhaps) licenses, but also the “1,000 shares of Choice Radio Corporation stock”

purported held by the Bank. If Jaynes were to acquire the stock, it should have filed an application for transfer of control of Choice. The Choice Radio Corporation stock is not an asset of the Corporation. It is an asset of Jonathan Smith, currently the sole owner of record. By acquiring the stock, if the FCC were to allow such, Jaynes would be acquiring the liabilities of the Corporation. The Corporation's liabilities to third parties (including but not limited to MCI) are not insubstantial. Thus, the transaction documents are internally incoherent, and do not present a proper basis for the FCC to bless the proposed transaction (whatever it really is).

Petitioners have standing to object to the transfer and assignment applications put forward by the Bank and Jaynes because their interests would be aggrieved if the Bank is somehow allowed to trample many decades of FCC jurisprudence in order to benefit from improper pledge and security documents, and from its premature actions to exercise control of Choice long before the grant of any FCC authority to do so – all of which have been calculated to strip Mr. Smith of his control of the corporation, and of Strategic of its contract right to acquire WTBK.

In this regard, we note that Jaynes also is complicit in such premature assumption of control. Jaynes subverted the loyalty of Choice's principal employee in the Barbourville – Manchester area, Sean Terrill at an early stage. Even though under Kentucky law an employee owes its employer a duty of loyalty, Jaynes (or Mr. Pirkle) recruited Mr. Terrill to act as registered agent for Jaynes as early as last August. See the company's Articles of Organization, a copy of which is attached as Exhibit B hereto.

Thus for the past six months, Mr. Terrill has been feeding the proposed buyer with confidential information about Choice, in violation of his duties.

CONCLUSION

In view of the foregoing, the Bank, Davenport and Jaynes have not demonstrated that they satisfied the requirements of the Communications Act and Commission policy that the FCC approval a transfer of control to a neutral third party in advance of a creditor's sale of a broadcast license and the incidents of a going broadcast operation. Consequently, the Petitioners request that the FCC dismiss or deny the transfer and assignment applications. Respectfully submitted,

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