POSTED 7/9/09

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

AUDIO SERVICES DIVISION
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Federal Communications Commission
Office of the Secretary

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| In re Application of | ) | |
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| BERNARD DALLAS LLC | ) | |
| (Assignor) | ) | File Nos. BAL-20070216ABA-ABB |
| | ) | |
| and | ) | |
| | ) | |
| PRINCIPLE BROADCASTING | ) | |
| NETWORK – DALLAS LLC | ) | |
| (Assignee) | ) | |
| | | |
| For Consent to the Assignment of | ) | |
| Licenses of Radio Stations | ) | |
| KFCD(AM), Farmersville, Texas | ) | Facility ID #43757 |
| KHSE(AM), Wylie, Texas | ) | Facility ID #133464 |

To: Secretary, Federal Communications Commission
Attn: The Commission

## OPPOSITION TO APPLICATION FOR REVIEW

Bernard Dallas LLC ("Bernard"), by its attorneys and pursuant to Section 1.115(d) of the Commission's rules, hereby opposes the Application for Review filed on June 19, 2009, by David A. Schum *et al.* (the "Petitioners") and Joy Crain Johns. Petitioners and Johns seek review of the Media Bureau, Audio Division's May 20, 2009 letter decision (the "Decision")[1] in the above-captioned matter. The *Decision* denied reconsideration of the Media Bureau's February 19, 2008 decision denying Petitioners' Petition to Deny and Johns' Informal Objection, and granting the above-captioned application for consent to the assignment of license of Station KFCD(AM), Farmersville,

[1] *Letter to Richard R. Zaragoza, Esq., et al.*, DA 09-1103 (MB, May 20, 2009).

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Texas and Station KHSE(AM), Wylie, Texas from Bernard to Principle Broadcasting Network-Dallas LLC ("Principle").[2] The Application for Review is repetitive of previous filings of Petitioners. It is yet another in an almost unending line of repetitious and frivolous appeals by Petitioners in this matter, the primary effect of which has been to waste scarce Commission resources. The Application for Review is completely devoid of substantive merit and should be summarily dismissed or denied.

Petitioners comprise nine individuals who are disgruntled putative investors and/or creditors of the stations' prior owner, who do not challenge the merits of the Bernard-Principle transition or Principle's qualifications as a purchaser, but, instead, seek to derail an earlier, now-completed bankruptcy sale of the stations unrelated to this assignment application. Petitioners are purported equity owners of The Watch, Ltd. ("Watch"). Watch's subsidiary, DFW Radio License, LLC ("DFW"), is the former licensee of Stations KFCD(AM) and KHSE(AM). Watch and DFW entered Chapter 11 bankruptcy in 2005. Following a public auction mandated and supervised by the Bankruptcy Court, the Court approved the sale of Watch/DFW's assets to D.B. Zwirn Special Opportunities Fund, L.P. ("DBZ"), the high bidder at auction.[3]

Pursuant to the terms of the Court-approved sale, an application was filed with the Commission in January 2006 seeking consent to the assignment of the KFCD(AM) and KHSE(AM) authorizations to Bernard, DBZ's designee. Petitioners filed a Petition to Deny that application. On December 28, 2006, the Media Bureau, Audio Division issued

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[2] *Letter to Richard R. Zaragoza, Esq., et al.*, 23 FCC Rcd 2642 (MB 2008) (the "Grant Decision").

[3] The Fifth Circuit Court of Appeals dismissed Petitioner Schum's appeal of that sale approval order on December 7, 2007. *See Schum v. Zwirn Special Opportunities Fund L.P. (In re The Watch, Ltd.)*, Case No. 06-11367, 2007 WL 4328801 (5th Cir. 2007).

a decision thoroughly considering and rejecting Petitioner's contentions and approved the stations' assignment to Bernard.[4]

Petitioners sought reconsideration of the assignment approval, which the Media Bureau denied.[5] The Bureau concluded that the reconsideration petition was without substantive merit to the extent that it raised new matters and was otherwise procedurally defective because it merely repeated Petitioners' already-rejected allegations of prohibited foreign ownership and unauthorized transfer of control.[6] The Bureau found various newspaper articles submitted in the Petition for Reconsideration to be irrelevant to Petitioners' contentions regarding DBZ's alleged non-compliance with Section 310 of the Communications Act.[7]

Bernard filed the instant assignment application in February 2007, seeking consent to the assignment of the KFCD(AM) and KHSE(AM) authorizations to Principle. Petitioners filed a Petition to Deny that assignment, mainly reiterating the same grounds on which they had challenged the earlier assignment to Bernard. After the close of the pleading cycle, Johns (individually and as Executrix of the Estate of Albert Crain, deceased) filed an Informal Objection to the application, which substantially repeated Petitioner's allegations.[8]

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[4] *Letter to David A. Schum, et al.*, 21 FCC Rcd 1496 (MB 2006), (the "DFW-to-Bernard Decision"). Pursuant to the Commission's consent and the Court's sale approval, Bernard consummated its acquisition of the station licenses on January 31, 2007.

[5] *Letter to Dennis J. Kelly, Esq., et al.*, 23 FCC Rcd 2646 (MB 2008). (the "DFW-to-Bernard Reconsideration Decision").

[6] 23 FCC Rcd at 2647.

[7] *Id.*

[8] Johns did not disclose her own interest, or that of the estate she purports to represent, on the record. However, based on 2007 deposition testimony of David Schum, the principal and manager of the now-bankrupt Watch and DFW, it appears that Johns' late father is a purported party to a decade-old contract with Watch and/or its principal, and that Johns has communicated with Petitioners. *See* Bernard Response to Informal Objection, filed June 21, 2007 at 3-4 and Exhibit A. The Media Bureau characterized Johns' Informal Objection as "woefully belated." *Grant Decision*, 23 FCC Rcd at 2643, n. 7.

In denying Petitioners' Petition to Deny and Johns' Informal Objection to the Bernard-Principle assignment application, the Media Bureau again rejected Petitioners' and Johns' repetitive allegations concerning unauthorized transfer of control and abuse of process, finding that these allegations "merely replicate those we rejected in connection with the DFW-to-Bernard assignment," and concluding that "Petitioners' and Johns' attempts to reprise arguments already made and rejected is improper."[9] The *Grant Decision* similarly found Petitioners' and Johns' proffered newspaper articles and court pleading irrelevant and/or insufficient to warrant further consideration.[10]

Petitioners and Johns then sought reconsideration of the *Grant Decision*, repeating the same tired arguments which had already been repeatedly rejected by the Media Bureau. The Bureau denied Petitioners' and Johns' Petition for Reconsideration, and their Supplements to the Petition for Reconsideration, noting that their contentions had been addressed "multiple times".[11] The Bureau also rejected Petitioners' claim that newly discovered facts warranted reconsideration. The Bureau denied one Motion for Leave to File a Supplement to Petition for Reconsideration, dismissing the Supplement on procedural grounds on the bases that it "did not warrant consideration under Section 1.106(c) of the Commission's rules."[12]

While it considered the substance of a Second Supplement to Petition for Reconsideration, the Bureau concluded that the material proffered did not contain facts indicating any violation of Commission rule or policy. Regarding Petitioners' assertions

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[9] *Id.* at 2645.
[10] *Id.* at 2644.
[11] *Decision at 3.*
[12] *Id.* at 4. Even when considered substantively, the Commission found that the Supplement did not contain information indicating a violation of Section 310 of the Communications Act or any misrepresentation regarding ownership.

with respect to an FCC Enforcement Bureau investigation involving DBZ and affiliated companies, the Media Bureau noted that the Enforcement Bureau investigation did not pertain to the stations involved in the assignment. Moreover, the Commission had terminated the investigation and the parties had entered into a Consent Decree that barred the Commission from considering facts developed in the investigation or the actual existence of the Consent Decree in future cases. Finally, the Bureau observed that Petitioners had "failed to show that the investigation concerned matters that would be of decisional significance in the instant application proceeding."[13] With respect to Petitioners' allegations regarding an SEC investigation of DBZ, the Bureau concluded that the allegation was supported only by newspaper articles, which, as hearsay, was not reliable evidence of the truth of the matters related in the article. Moreover, the investigation apparently had not resulted in any adjudication and the information in the newspaper articles regarding alleged non-FCC conduct wholly failed to raise a substantial and material question of fact requiring further inquiry as to whether any of the parties lacked necessary character to be a Commission licensee.[14]

With the filing of the instant Application for Review, Petitioners and Johns continue their wasteful and redundant appeals. The latest Application for Review fails to establish legal error in either the *Decision* or the *Grant Decision* that it affirmed. Far from showing the existence of any of the Section 1.115(b)(2) factors that it recites, the Application for Review mostly lifts and repeats Petitioners' prior submissions with respect to their contentions regarding foreign ownership, unauthorized transfer of control

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[13] *Id.* at 5-6.
[14] *Id.* at 5.

and reversionary interest, arguments which were repeatedly considered and rejected.[15] To a significant extent, the Application for Review is a virtual duplicate of an Application for Review filed by Petitioners with respect to the February 19, 2008 *DFW-to-Bernard Reconsideration Decision*. Petitioners, despite repeated Commission admonitions not to do so,[16] also improperly incorporate by reference allegations made in their earlier-filed Application for Review.[17]

The *Grant Decision* dealt in specific detail with Petitioners' arguments. The instant *Decision* concluded that Petitioners' reconsideration petition was "repetitious" and otherwise irrelevant. The latest Application for Review does little more than rehash Petitioners' tired arguments again. Nothing in the specious Application for Review provides any basis for disturbing the decisions below.

In fact, the only new argument made by Petitioners concerns their misstatement regarding the holding in the recent Commission *Report and Order and Fourth Further*

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[15] Allegations of unauthorized transfer of control of KHSE have been considered and thoroughly rejected. Likewise, Bernard's ownership has been passed upon and approved despite persistent unsupported allegations that Bernard's ownership failed to comply with foreign ownership limitations. Petitioners substitute speculation, surmise and innuendo for a *prima facie* factual showing that Bernard's ownership violates Commission rule or policy.

[16] *Decision at* n. 10 ("[W]e reject this further attempt by Petitioners to incorporate herein its numerous prior pleadings in this matter"); *DFW-to-Bernard Reconsideration Decision*, 23 FCC Rcd at 2648. *See Red Hot Radio, Inc.*, 19 FCC Rcd 6737, 6745 n. 63 (2004)("Our rules do not allow for a 'kitchen sink' approach to an application for review; rather the burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the application for review. 47 C.F.R. Section 1.115(b)(2)(i)." Given the fact that Petitioners have been repeatedly advised not to engage in this tactic, their unwillingness to abide by the Commission's rules and procedures warrants sanction. It is noteworthy in this regard that the Media Bureau previously admonished Petitioners for filing "frivolous and obstructive pleadings which are wholly devoid of merit." *Decision* at pp. 2, 6. This follows an action by the Bankruptcy Court sanctioning Petitioner David Schum for filing a motion that, in the Court's view, "[c]onstituted frivolous litigation, harassment and a waste of the Court's time…" The Court ordered Schum to "stop filing such pleadings in these bankruptcy cases" pertaining to the estates' prior sale of their broadcasting assets as approved by the Court. May 22, 2007 Order of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division in *In re The Watch Ltd., et al.,* Case No. 05-35874-BJH.

[17] Petitioners' Application for Review, filed June 19, 2009 at 4.

*Notice of Proposed Rulemaking in MB Docket No. 07-294*.[18] Petitioners declare that the *Report and Order* requires broadcast licensees with complex ownership structures, including "non-attributable principals", to disclose their ownership on a new FCC Form 323 Ownership Report due on or before November 1, 2009.[19]

Unfortunately for Petitioners, the *Report and Order* says no such thing. To the contrary, it states that the Commission will be "requiring *certain* nonattributable interests to be reported."[20] Rather than concluding that all non-attributable principals would need to be listed, the Commission stated that it would collect information "from holders of equity interests in a licensee that would be attributable but for the single majority shareholder exemption and from holders of interests that would be attributable but for the higher Equity/Debt plus thresholds" adopted in a 2008 Commission Order for purposes of determining attribution of certain interests in eligible entities.[21] Bernard's nonattributable investors do not fall into either of these categories and Petitioners have not otherwise demonstrated that Bernard's nonattributable investors would be included in the new FCC Form 323 Ownership Report. In fact, Bernard's nonattributable investors need not be listed under the Commission's new requirements.

Accordingly, Petitioners' position is as "frivolous" and "obstructive" as previously characterized by the Media Bureau in its May 20, 2009 *Decision*.[22] As noted, that Decision admonished Petitioners for their attempts to delay the proceeding. In the current Application for Review, Petitioners continue on a course of vexatious and

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[18] FCC 09-283 (released May 5, 2009) ("Report and Order").
[19] Petitioners' Application for Review at 7-8.
[20] *Report and Order* at para. 3 (emphasis added).
[21] *Id* at para. 17.
[22] *See* note 15.

frivolous litigation in their attempt to obtain from the Commission relief denied them by the Bankruptcy Court when it approved and upheld the sale of the Stations' assets to Bernard. Petitioners and Johns, who, as noted, neither challenge the Bernard-Principle transaction nor Principle's qualifications, have ignored the Commission's repeated admonitions and persist in filing repetitive and wasteful appeals, stepping well over the line into abuse of process. As such, the instant Application for Review should be summarily dismissed or denied.[23]

Respectfully submitted,

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[23] *See Evan Doss, Jr. Corporation*, 18 FCC Rcd 22557, 22558 (2003)("[T]he Commission is not required to entertain frivolous, redundant pleadings"); *Nationwide Communications, Inc.*, 13 FCC Rcd 5654 (1998).

## CERTIFICATE OF SERVICE

I, Valerie A. Higgs, in the law firm of Shainis & Peltzman, Chartered, hereby certify that I have on this 6th day of July, 2009, caused to be hand-delivered, a copy of the foregoing "Opposition to Application for Review" to the following:

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