

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of
FoxFur Communications, LLC,
WOLF Radio, Inc., and
Family Life Ministries, Inc.
For Consent to Assignment of Licenses for
WCIS-FM, Deruyter, New York
W252AC, Fairmount, New York
For Consent to Assignment of License for
WCIO(FM), Oswego, New York
For Consent to Assignment of License for
WNDR-FM, Baldwinsville, New York
NAL/Acct. No. 201641410009
FRN: 0018750067
Facility ID. Nos. 22134 and 25016
File No. BALH-20160408ABJ
File No. BALFT-20160408ABK
Facility ID No. 5344
File No. BALH-20160408ABL
Facility ID No. 7716
File No. BALH-20160408ABI

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 15, 2016

Released: June 15, 2016

By the Chief, Audio Division:

I. INTRODUCTION

1. We have before us the captioned applications for consent to the assignment of licenses for Stations: (1) WCIS-FM, Deruyter, New York, and W252AC, Fairmount, New York, from FoxFur Communications, LLC (FoxFur LLC) to Family Life Ministries, Inc. (Family); (2) WCIO(FM), Oswego, New York, from WOLF Radio, Inc. (WOLF)1 to Family; and (3) WNDR-FM, Baldwinsville, New York,2 from Family to FoxFur LLC (collectively, the Assignment Applications).3 The Assignment Applications include a request by FoxFur for a temporary waiver of Section 73.3555(a) of the Commission's Rules (the Rules),4 which sets forth the limits on the number of stations a party may own in a local radio market (the Waiver Request).

2. In this Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture

1 FoxFur LLC and WOLF are commonly-controlled entities (collectively, FoxFur).

2 The call sign of WNDR-FM was changed to WOLF-FM on April 14, 2016, subsequent to the filing of the Assignment Applications.

3 Section 1.2(d) of the Exchange Agreement for the stations specifies that in addition to WNDR-FM, Family will assign the license for FM Translator Station W207BH, Baldwinsville, New York (Facility ID No. 93092), to FoxFur LLC. According to CDBS, an application to assign the W207BH license to FoxFur LLC has not yet been filed.

4 47 CFR § 73.3555(a).

(*NAL*),⁵ we find that FoxFur willfully and repeatedly violated the Commission's multiple ownership rule, Section 73.3555 of the Rules, by implementing a time brokerage agreement with Family that resulted in FoxFur having an unauthorized attributable interest in eight radio stations in the Syracuse radio market, in violation of Section 73.3555(a)(1)(ii) of the Rules.⁶ Based upon our review of the record before us, we conclude that FoxFur is apparently liable for a monetary forfeiture in the amount of twenty thousand dollars (\$20,000). Finally, for the reasons set forth below, we deny the Waiver Request and dismiss the Assignment Applications.

II. BACKGROUND

3. On March 28, 2016, FoxFur LLC and WOLF, commonly-controlled entities,⁷ entered into an Exchange Agreement with Family, pursuant to which FoxFur would assign WCIS-FM, W252AC, and WCIO(FM) to Family in exchange for Family's station WNDR-FM (WCIS-FM, W252AC, WCIO(FM), and WNDR-FM, collectively, the Stations). On the same date, FoxFur and Family also executed cross Time Brokerage Agreements (TBA), whereby Family would broker 100 percent of the programming for WCIS-FM and WCIO(FM), and FoxFur LLC would broker 100 percent of the programming for WNDR-FM.⁸ On April 8, 2016, FoxFur and Family filed the subject applications seeking Commission consent to assign the licenses for (1) WCIS-FM and W252AC from FoxFur LLC to Family; (2) WCIO(FM) from WOLF to Family; and (3) WNDR-FM from Family to FoxFur LLC.

4. The Stations are located in the Syracuse, New York, Nielsen Audio Metro Market (Syracuse Metro). In the Syracuse Metro, a party may own or hold attributable interests in up to seven radio stations, no more than four of which are in the same service.⁹ Prior to executing the TBA, FoxFur held attributable interests in seven radio stations (four FM and three AM) in the Syracuse Metro.¹⁰ The March 28, 2016, commencement of the TBA resulted in FoxFur having an attributable interest in eight radio stations, five of which are FM stations, in the Syracuse Metro, in violation of the local radio ownership rule, Section 73.3555(a)(1)(ii).¹¹

⁵ This *NAL* is issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (Act), and Section 1.80 of the Commission's Rules (Rules). 47 U.S.C. §§ 309(k), 503(b); 47 CFR § 1.80. The Bureau has delegated authority to issue the *NAL* under Section 0.283 of the Rules. 47 CFR § 0.283.

⁶ 47 CFR § 73.3555(a)(1)(ii).

⁷ Craig Fox holds a 100 percent ownership interest in WOLF and an 80 percent membership interest in FoxFur LLC.

⁸ See Section 1.1 of the TBA (providing that "Licensee agrees to make the broadcasting transmission facilities of the Station available to Broker commencing at 12:01 p.m. on March 28, 2016, for the broadcast of Broker's programs twenty-four hours a day, seven days a week, except as otherwise provided.").

⁹ See 47 CFR § 73.3555(a)(1)(ii) (in a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations, permitting a cognizable interest in not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM)). According to BIA, there are 41 stations in the Syracuse Metro.

¹⁰ FoxFur's Craig Fox has a cognizable interest in the following stations in the Syracuse Metro: WMVN(FM), Sylvan Beach, New York; WOLF(AM), Syracuse, New York; WOSW(AM), Fulton, New York; WSIV(AM), East Syracuse, New York; WSEN-FM, Mexico, New York; and the subject stations, WCIS-FM and WCIO(FM).

¹¹ As a result of the TBA, FoxFur has an impermissible cognizable interest in the brokered station, WNDR-FM. See 47 CFR § 73.3555(a)(1)(ii) and Note 2(j) of Section 73.3555 ("where two radio stations are located in the same market ... and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of time per week of the other such station, that party shall be treated as if it has an interest in the brokered station").

5. In the WNDR-FM Assignment Application, FoxFur requests a temporary waiver of Section 73.3555(a)(1)(ii) of the Rules while the parties await action on the Assignment Applications. In support of the waiver request, FoxFur argues that the Commission has previously granted twelve-month temporary waivers for similar situations. In addition to the short duration of the waiver, FoxFur asserts that other factors support grant, including: (1) the fact that the transaction brings two new FM voices to the Syracuse Metro, and the TBAs introduce listeners in the market to Family's programming; and (2) the high level of competition currently existing in the Syracuse Metro, which would not be adversely affected by a grant of the waiver.¹²

III. DISCUSSION

6. *Section 73.3555 Violation.* As noted above, prior to filing the Assignment Applications, FoxFur LLC and Family entered into a TBA in which FoxFur LLC would broker 100 percent of the programming of WNDR-FM, which is part of the Syracuse Metro. At this time, FoxFur held a cognizable interest in the maximum number of stations permitted in this market. Pursuant to Note 2(j) of Section 73.3555 of the Rules, "where two radio stations are both located in the same market," as defined by the local radio ownership rule, "and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of time per week of the other such station, that party shall be treated as if it has an interest in the brokered station"¹³ Accordingly, on March 28, 2016, the commencement date of the TBA, FoxFur held a cognizable interest in eight stations, including five FM stations, in the Syracuse Metro, in violation of Section 73.3555(a)(1)(ii) of the Rules.¹⁴

7. In the WNDR-FM TBA, FoxFur inaccurately represented that "the entering into of this TBA does not violate the FCC's multiple ownership rules, and the TBA complies with ... Section 73.3555 of the Commission's Rules."¹⁵ Conversely, FoxFur also recognized the Section 73.3555 violation in the WNDR-FM Assignment Application and requested a temporary waiver of the Commission's local radio ownership rules. In its Waiver Request, FoxFur correctly acknowledges that an applicant seeking a waiver faces a "high hurdle" and attempts to persuade the Commission that the "public interest supports a short-term waiver" to allow it to have a cognizable interest in eight stations in the Syracuse Metro.¹⁶ FoxFur, however, chose not to wait for the Commission to act on its waiver request, but rather, began programming WNDR-FM in fully known and clear violation of the Rules. FoxFur does not attempt to explain why it was imperative that it enter into and operate under the TBA, without waiting for the Commission to approve the Waiver Request, or how the public interest supports such a result.¹⁷ Business expedience is not synonymous with the public interest.

8. Regardless of whether or not a waiver of the Commission's local radio ownership rule is

¹² See BALH-20160408ABI at Attachment 18, "Multiple Ownership Statement and Temporary Waiver Request."

¹³ 47 CFR § 73.3555, Note 2(j)(1).

¹⁴ See 47 CFR § 73.3555(a)(1)(ii).

¹⁵ See BALH-20160408ABI at Attachment 17, TBA at Section 18(c). See also Note 2(j)(3) of 47 CFR § 73.3555 (requiring certification within the TBA by the brokering station that the agreement complies with the local ownership numerical limits). FoxFur LLC erroneously certified that the TBA "complies with the provisions of paragraphs (b), (c), and (d) of Section 73.3555" [requirements if the brokering station is a television station], not paragraphs (a), (c), and (d), as required of brokering radio stations.

¹⁶ See BALH-20160408ABI at Attachment 18.

¹⁷ See, e.g., *Macau Traders, Inc.*, Memorandum Opinion and Order and Forfeiture Order, 13 FCC Rcd 228, 232 para. 10 (1998)(finding it "inappropriate to enter into and operate under a brokerage arrangement requiring a rule waiver from the Commission *before* first obtaining it.").

warranted in this case, we cannot countenance FoxFur's unorthodox approach to waivers. Rather, before a waiver may take effect, even on a temporary basis, the Commission must have the discretion to evaluate the propriety of the waiver request, determine whether it is in the public interest, and accordingly, grant or deny the request.

9. It is incontrovertible that absent explicit Commission action granting the waiver, FoxFur's premature implementation of the WNDR-FM TBA violates Section 73.3555 of the Rules. FoxFur's attempt to legitimize its actions by merely submitting a Waiver Request does not absolve it of this transgression or nullify the rule violation.¹⁸ We therefore deny the Waiver Request and issue this *NAL* to FoxFur for the violation of Section 73.3555 of the Rules.

10. *Proposed Forfeiture.* Under Section 503(b)(1)(B) of the Act, a person who is found to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹⁹ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.²⁰ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,²¹ and the Commission has so interpreted the term in the Section 503(b) context.²² Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."²³

11. The Commission's *Forfeiture Policy Statement*, Section 1.80 of the Rules, and Section 503(b)(2)(A) of the Act establish Commission guidelines for assessing forfeitures.²⁴ These guidelines, however, do not enumerate a base forfeiture amount for violations of the Commission's local ownership rules, Section 73.3555. Under these circumstances, we must assess the forfeiture amount taking into account the relevant statutory factors in Section 503(b)(2)(D) of the Act, including the "nature, circumstances, extent and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²⁵

12. In this case, FoxFur was fully aware that the commencement of the TBA for WNDR-FM resulted in its cognizable interest in eight radio stations in the Syracuse Metro, in violation of Section 73.3555(a)(1)(ii) of the Rules. Nevertheless, FoxFur initially began brokering WNDR-FM without first notifying the Commission and requesting a waiver. Moreover, when FoxFur submitted its Waiver Request, it did not await FCC staff approval, as required, but rather, continued to broker WNDR-FM, in

¹⁸ We recognize that the grant and consummation of the Assignment Applications would ultimately bring FoxFur into compliance with Section 73.3555. It would not, however, relieve FoxFur of the violations that have already occurred.

¹⁹ 47 U.S.C. § 503(b)(1)(B). *See also* 47 CFR § 1.80(a)(1).

²⁰ 47 U.S.C. § 312(f)(1).

²¹ *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²² *See Southern California Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 para. 5 (1991) *recon denied*, 7 FCC Rcd 3454 (1992).

²³ 47 U.S.C. § 312(f)(2).

²⁴ *See Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (*Forfeiture Policy Statement*), *recon denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999); 47 CFR § 1.80.

²⁵ 47 U.S.C. § 503(b)(2)(D).

flagrant violation of the Rules. It thus appears that its violations were willful, and the duration of the violation, from March 28, 2016, until the present, was substantial.

13. We have considered the factors set forth in Section 503(b) of the Act²⁶ as well as Commission precedent concerning similar violations in order to determine the appropriate fine to impose on FoxFur.²⁷ Based upon our assessment of these factors, we propose a forfeiture in the amount of \$20,000 for the Section 73.3555 violation. This proposed forfeiture is limited to the period from March 28, 2016, to the release date of this *NAL*.

14. *Assignment Applications.* FoxFur is a party to each of the interrelated Assignment Applications and TBAs for Stations WNDR-FM, WCIS-FM, W252AC, and WCIO(FM). Absent a waiver, the Assignment Applications currently give FoxFur an attributable interest in eight radio stations in the Syracuse Metro, in violation of Section 73.3555(a)(1)(ii) of the Rules. Accordingly, we dismiss the Assignment Applications as defective, without prejudice to refile.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, that the request by FoxFur Communications, LLC and WOLF Radio, Inc. for a waiver of Section 73.35555 of the Rules, IS DENIED, and that the April 8, 2016, applications of FoxFur Communications, LLC, WOLF Radio, Inc., and Family Life Ministries, Inc. for the assignment of licenses of Stations WCIS-FM, Deruyter, New York, W252AC, Fairmount, New York, WCIO(FM), Oswego, New York, and WNDR-FM, Baldwinsville, New York (FCC File Nos. BALH-20160408ABJ, BALFT-20160408ABK, BALH-20160408ABL, and BALH-20160408ABI), ARE DISMISSED.

16. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that FoxFur Communications, LLC and WOLF Radio, Inc. are hereby NOTIFIED of their APPARENT LIABILITY FOR FORFEITURE in the amount of twenty thousand dollars (\$20,000) for their apparent willful and repeated violation of Section 73.3555(a)(1)(ii) of the Commission's Rules.

17. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the FCC's rules, that, within thirty (30) days of the release date of this *NAL*, FoxFur Communications, LLC and WOLF Radio, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

18. Payment of the proposed forfeiture must be made by check or similar instrument, wire transfer or credit card, and must include the *NAL*/Acct. No. and FRN No. referenced herein. Regardless of the form of payment, a completed FCC Form 159 must be submitted. When completing the FCC Form 159, enter the *NAL*/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Licensee will also send electronic notification on the date said payment is made to Michael.Wagner@fcc.gov. Below are additional instructions that should be followed based on the form of payment selected:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St.

²⁶ *Id.*

²⁷ See, e.g., *Hicks Broadcasting of Indiana*, Decision of Chief Administrative Law Judge, 14 FCC Rcd 8412 (1999) (assessing a \$20,000 forfeiture for a Section 310(d) violation and Section 73.3555(d)(2) violation); *American Radio Systems Corp.*, Letter, 13 FCC Rcd 9588 (1998) (\$18,500 forfeiture for unauthorized assumption of control of a radio station which, without a waiver, resulted in a violation of Section 73.3555(a) of the Rules).

Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2- GL, 1005 Convention Plaza, St. Louis, MO 63101.

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

19. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington DC 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

20. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

21. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.²⁸

22. IT IS FURTHER ORDERED that copies of this Order shall be sent, by First Class and Certified Mail, Return Receipt Requested, to FoxFur Communications, LLC and WOLF Radio, Inc., 401 W. Kirkpatrick Street, Syracuse, NY 13204, and to its counsel, Francisco R. Montero, Esq., Fletcher Heald & Hildreth, PLC, 1300 North 17th Street, 11th Floor, Arlington, VA 22209, and to counsel for Family Life Ministries, Inc., Joseph C. Chautin III, Esq., Hardy, Carey, Chautin, & Balkin, LLP, 1080 West Causeway Approach, Mandeville, LA 70471.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁸ 47 CFR § 1.1914.