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

In re Application of	)	
	)	
Mr. Luis A. Mejia	)	Facility I.D. No. 4936
	)	NAL/Acct. No. MB-200841410030
and	)	FRN: 0016335481
	)	File No. BALH-20070820AGE
MSG Radio, Inc.	)	
	)	
For Assignment of License WIAC-FM, San Juan, Puerto Rico	)	

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: August 4, 2008 **Released: August 5, 2008**

By the Chief, Audio Division:

I. INTRODUCTION

1. The Media Bureau has before it the above-captioned application (the "Application") of Luis A. Mejia ("Mejia") for assignment of the license of station WIAC-FM, San Juan, Puerto Rico (the "Station"), to MSG Radio, Inc. ("MSG").[1] We also have two Petitions to Deny the Application (the "Petitions"): one from Jose A. Rivera ("Rivera") dated September 7, 2008, the other from Juan de Arsuante ("Arsuante") dated September 19, 2008. For the reasons stated below, we dismiss the Petitions and grant the Application. However, the Bureau finds that MSG failed to submit all of the required information on the Application detailing a "complete and final understanding" between the licensee and assignee.[2] Therefore, in this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* ("*NAL*"), issued pursuant to 503(b) of the Communications Act of 1934,[3] as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),[4] by the Chief, Audio Division, Media Bureau, by the authority delegated under Section 0.283 of the Rules,[5] we find that Mejia and MSG are each apparently liable for a monetary forfeiture in the amount of three thousand dollars ($3,000).

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[1] File No. BALH-20070820AGE.

[2] *See* Assignment Application, Section II, Item 3 and Exhibit 4; *see also* 47 C.F.R. § 1.80(b)(4).

[3] *See* 47 U.S.C. § 503(b).

[4] *See* 47 C.F.R. § 1.80.

[5] *See id*. § 0.283.

II. BACKGROUND

2. Mejia and MSG submitted the Application on August 20, 2007. Pursuant to the Asset Purchase Agreement between Mejia and MSG, dated August 10, 2007 (the "Mejia-MSG APA"), Mejia has agreed to assign the Station license, the Station call sign, the Station's books and records (including its public inspection file), and goodwill and other intangibles associated with the Station, to MSG for the sum of four million dollars ($4,000,000.00). The purchase price is being financed by the assignor, through a promissory note from Mejia to MSG, secured by a pledge of MSG stock. The sale does not include any other real or personal property used in operating the Station.

3. In the Application, Mejia and MSG certify in Section II, Item 3, that they have not submitted copies of all agreements for the sale of the Station, which would reflect a complete and final understanding between the licensee and assignee.[6] Mejia and MSG provide in Exhibit 4 of the Application copies of the Mejia-MSG APA and an Escrow Agreement whereby Media Services Group, Inc. will hold certain deposits contemplated by the Mejia-MSG APA. However, Mejia and MSG state that a schedule regarding "excluded assets" (Excluded Assets Schedule) from the transaction has been redacted because it contains "proprietary information not germane to Commission consideration of [the] Application."[7] No other agreements are listed in the Exhibit.

4. Shortly after the Application's filing, we received the Petitions in which Rivera and Arsuante allege that Mejia and MSG lacked candor with the Commission by withholding documents germane to the transaction. Specifically, both purported to provide copies of an Asset Purchase Agreement (the "Bestov-Madifide APA") dated August 10, 2007, between Bestov Broadcasting, Inc. of Puerto Rico ("Bestov") and Madifide, Inc. ("Madifide"); and an undated Shared Services Agreement (the "MSG-Madifide SSA") between MSG and Madifide. Mejia is the 100 percent shareholder of Bestov. In the Bestov-Madifide APA, Bestov proposes to sell Madifide tangible and intangible assets associated with the leases for the studio, office, and transmitter facilities needed to operate the Station for a total price of twelve million five hundred thousand dollars ($12,500,000.00). Under the MSG-Madifide SSA, Madifide would provide MSG with access to the station's studio and tower. However, the MSG-Madifide SSA excludes the sharing of other services including, but not limited to MSG's employees, contractors, sales, accounting, programming, and related advertising decisions.

5. After reviewing the Petitions, the staff sent a letter of inquiry (the "Inquiry Letter") to Mejia, MSG, and Madifide on May 2, 2008, requesting more information to determine whether MSG "will exercise a meaningful degree of control over the Station's programming."[8] We received separate responses to the Inquiry Letter (the "Responses") from the parties on June 9, 2008.

6. According to the Responses, MSG and Madifide began talks about a possible Station sale in October 2006, when Madifide's counsel initiated contact with MSG President George Reed ("Reed").[9]

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[6] FCC Form 314, § II, Item 3.

[7] Assignment Application, Exhibit 4. MSG and Madifide cite to *In re LUJ, Inc. and Long Nine, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 16980 (2002) ("*LUJ, Inc.*"), to support their decision to redact certain proprietary information which they deemed not to be germane to the Commission's consideration of the Application.

[8] *Letter to Luis A. Mejia, MSG Radio, Inc., and Madifide, Inc.*, Reference 1800B3-TSN (MB May 2, 2008) (the "Inquiry Letter") at 2.

[9] MSG Response to Inquiry Letter at 3.

These talks later resulted in the parties' drafting of the Mejia-MSG APA.[10] The Responses also include copies of the Bestov-Madifide APA, the MSG-Madifide SSA, and a non-finalized, non-executed Option Agreement (the "MSG-Madifide Option Agreement") between MSG and Madifide. The MSG-Madifide Option Agreement proposes that MSG extend to Madifide a two-year, irrevocable option to purchase the Station license when qualified to do so under FCC rules and policies.[11]

7. While awaiting the Responses, the staff learned that neither Arsuante nor Rivera works or resides at the addresses submitted with the Petitions. Both copies of the Inquiry Letter sent to the addresses were returned to the Commission in May 2008. Rivera's copy included a letter from Jose A. Ribas Dominicci, informing the Commission that "no such person" existed at that address.[12] Arsuante's copy returned unopened with "No Such Number" stamped on the envelope.[13]

III. DISCUSSION

8. *Procedural Issues*. Subscription and Verification. Petitioners or their representing attorneys must "sign and verify" all petitions submitted to the Commission for review and "state [their] address" pursuant to Section 1.52 of the Rules.[14] Documents signed with "intent to defeat the purpose of [Section 1.52] . . . may be stricken as sham and false, and the matter may proceed as though the document had not been filed."[15] However, the staff may still consider a petition's merits even when it is dismissed for failure to conform to Commission rules and procedures.[16]

9. In the present case, we have not been able to contact Arsuante and Rivera at either of the addresses submitted with the Petitions. After the staff tried to send Arsuante and Rivera copies of the Inquiry Letter, both were returned to the Commission after unsuccessful deliveries. Therefore, we will dismiss the Petitions for failing to comply with Section 1.52 of the Rules, but we will exercise our discretion and review the Petitions' merits.

10. *Substantive Issues*. "Bare License Policy." When considering proposed license assignments which include no other real assets, the Commission will review "the entirety of the proposed transaction"[17] and whether the assignee would have the ability to maintain broadcast operations.[18] Here, Mejia proposes to assign to MSG the Station's intangible assets such as the license and call sign subject to the Mejia-MSG APA, and Madifide would acquire the Station's tangible assets including the tower site

[10] *Id*.

[11] *See id*. at Exhibit A, 975. The submitted draft of the MSG-Madifide Option Agreement is dated July 17, 2007.

[12] *Letter from Jose A. Ribas Dominicci to the Commission* (May 5, 2008).

[13] *See Letter to Juan de Arsuante*, Reference 1800B3-TSN (MB May 2, 2008).

[14] 47 C.F.R. § 1.52.

[15] *Id*.

[16] *See In re Stockholders of CBS, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 3733, 3739 (1995) (citing *In re Booth American Company*, Memorandum Opinion and Order, 58 FCC.2d 533, 534 (1976)).

[17] *In re FM Broadcasters of Douglas County*, Memorandum Opinion and Order, 10 FCC Rcd 10429 (1995).

[18] *See In re American Music Radio*, Memorandum Opinion and Order, 10 FCC Rcd 8769, 8772-73 (1995) ("American Music Radio").

and studio facilities pursuant to the Bestov-Madifide APA. Based on the terms of the MSG-Madifide SSA, however, MSG would have exclusive access to the main studio, as well as access to sufficient equipment to operate the Station, including transmitter and antenna facilities.[19] Accordingly, MSG would effectively "enjoy possession of the transmitter site as well as equipment and studio[] space" and would "be able to continue station operations subsequent to the assignment."[20] Therefore, we find that the proposed agreements among Mejia, MSG, and Madifide do not violate the Commission's policy regarding bare licenses.

11. Unauthorized Transfer of Control. Section 310(d) of the Act prohibits the transfer, assignment or disposal of any construction permit or station license "in any manner, voluntary or involuntary, directly or indirectly . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."[21] To determine "whether a prohibited transfer of control has occurred, we have traditionally looked beyond legal title to see whether a new entity . . . has obtained the right to determine basic operating policies of the station."[22] This means that "ultimate responsibility for essential station matters, such as personnel, programming and finances, is nondelegable."[23]

12. Reviewing the MSG-Madifide SSA, we find that although MSG and Madifide propose to share the Station's broadcast facilities, the agreement specifically excludes the sharing of responsibilities essential for MSG to maintain control over the Station. Among those responsibilities to be managed exclusively by MSG are: personnel, including "at least two full-time employees"; management; programming; finances; editorial policies; decisions regarding the amount and duration of commercial advertising; and use of the main studio.[24] Furthermore, the MSG-Madifide SSA states that neither party intends to propose a "partnership, joint venture, or agency relationship between the Parties."[25] MSG and Madifide have proposed a two-year option for Madifide to purchase the Station license, however, that is contingent upon Madifide becoming qualified to do so under FCC rules and policies,[26] and does not appear to reflect any undue influence on MSG's operations if MSG were to obtain the Station license. Therefore, in light of these facts, we find that no unauthorized transfer of control would result from allowing the assignment to proceed. Accordingly, we will grant the Application.

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[19] *See* MSG-Madifide Shared Services Agreement at 2.

[20] *See American Music Radio*, 10 FCC Rcd at 8772-73.

[21] 47 U.S.C. §310(d).

[22] *American Music Radio*, 10 FCC Rcd at 8771 (citing *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856, 863 (1969), aff'd sub nom. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).

[23] *See id.* (citing *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981)).

[24] *See* MSG-Madifide Shared Services Agreement at 2-4.

[25] *See id*. at 5.

[26] Madifide and its president, Jesus M. Soto, already have a "cognizable interest" in the licenses of several other broadcast stations in the Puerto Rican radio market, and any added interest associated with a new license would currently result in a violation of Section 73.3555 of the Rules regarding multiple ownership. *See* 47 C.F.R. § 73.3555.

13. Notwithstanding the fact that we have decided to grant the Application, the staff retains the authority under Section 503(b)(6) of the Act to impose a forfeiture on Mejia and MSG for failing to include all of the required information in Exhibit 4 of the Application.[27]

14. Providing Required Information. Section 1.80(b)(4) of the Rules gives a base penalty of $3,000 for any applicant who fails to provide "required information" on an Application submitted for Commission review.[28] The Commission operates a "largely self-policing" regulatory system,[29] and thus, to allow this type of conduct would "compromise the Commission's ability to adequately investigate" potential violations of its rules and procedures.[30]

15. In the present case, Mejia and MSG failed to provide the information required to fully answer Section II, Item 3. Instead, Mejia and MSG only supplied the MSG-Mejia APA and an Escrow Agreement, and stated that they had omitted an Excluded Assets Schedule because it contained "proprietary information not germane to Commission consideration of [the] Application." To support this decision, Mejia and MSG cite to *LUJ, Inc*.[31] However, based upon our review of the proposed transaction, we find that Mejia and MSG were required to submit the Bestov-Madifide APA and the MSG-Madifide SSA with the Application, and their failure to do so constitutes an actionable "failure to file required information" under Section 1.80(b)(4) of the Rules.[32]

16. In *LUJ, Inc*., the applicant certified that its assignment application was complete as filed even though it omitted certain schedules.[33] Nevertheless, the staff admonished the applicant rather than issuing a notice of apparent liability because the omissions were "not germane to the subject application [and did not] . . . constitute [] separate or additional agreement[s]."[34] That is not the case here. The Bestov-Madifide APA and the MSG-Madifide SSA are additional agreements that are essential to fully understanding the proposed assignment, even if they do not represent actual agreements between Mejia and MSG. Without the shared services agreement between MSG and Madifide, MSG would only be acquiring the Station's license and "intangibles," but not the equipment and studio space necessary to operate the Station. Consequently, this assignment without mention of the other agreements would violate the Commission's bare license policy.[35]

17. Furthermore, *LUJ, Inc.* explains that the Commission designed the streamlined application process to "ensure easy public access" to the transaction agreements proposed by an

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[27] *See* 47 U.S.C. § 503(b)(6).

[28] 47 C.F.R. § 1.80(b)(4).

[29] *See*, *e.g.*, *Contemporary Media*, *Inc. v. FCC*, 214 F.3d 187, 192 (D.C. Cir. 2000).

[30] *See In re Ultimate Medium Communications Corporation*, Notice of Apparent Liability for Forfeiture and Order, 22 FCC Rcd 17282, 17285 (2007).

[31] *See LUJ, Inc.*, 17 FCC Rcd at 16980.

[32] 47 C.F.R. § 1.80(b)(4).

[33] *LUJ, Inc.*, 17 FCC Rcd at 16981.

[34] *See id.* at 16982.

[35] *See American Music Radio*, 10 FCC Rcd at 8772-73.

applicant.[36] To achieve this aim, the Commission requires that an applicant identify excluded agreements and specifically state the basis for their exclusion.[37] Under this policy, however, Mejia and MSG were required, at a minimum, to identify the Bestov-Madifide APA and the MSG-Madifide SSA and provide a justification for not submitting copies of each with the Application. We note, in particular, that these agreements were necessary to understand how MSG would operate and maintain control of the Station. The importance of these agreements also is underscored by the fact the Bestov-Madifide APA involved consideration that was more than three times the consideration specified in the initially submitted agreements. The failure to disclose the existence of these agreements prevented the Commission and the public from determining whether such documents should, in fact, be submitted, thus undermining a key safeguard of the streamlined application process.[38] For these reasons, Mejia and MSG violated Section 1.80(b)(4) of the Rules by not filing the required information by the Application.

18. *Proposed Forfeiture*. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act.[39] Under that provision, any person who is determined by the Commission 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.[40] 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.[41] 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,[42] and the Commission has so interpreted the term in the Section 503(b) context.[43]

19. The Commission's *Forfeiture Policy Statement*, Section 1.80(b)(4) of the Rules, and Section 503(b)(2)(A) of the Act establish a base forfeiture amount of $3,000 for failure to file required forms or information.[44] To determine the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated 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."[45]

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[36] *LUJ, Inc.*, 17 FCC Rcd at 16982.

[37] *Id*. at 16983.

[38] *Id*. at 16984.

[39] 47 U.S.C. § 50(b)(1)(B) (emphasis added).

[40] *Id*.; *see also* 47 C.F.R. § 1.80(a)(1).

[41] 47 U.S.C. § 312(f)(1).

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

[43] *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

[44] *See Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I; 47 U.S.C. § 503(b)(2)(A); *see also Inflation Adjustment of Maximum Forfeiture Penalties*, Order, 69 FR 47788 (2004).

[45] 47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(4); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100.

20. Mejia and MSG failed to submit the required information in Exhibit 4 of the Application to provide a full understanding of the proposed assignment. Therefore, taking into consideration these facts, the factors required by Section 503(b)(2)(D) of the Act, and the *Forfeiture Policy Statement*, we propose to keep the base forfeiture amount at $3,000 for failing to provide required information to the Commission.

IV. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Luis A. Mejia and MSG Radio, Inc., are hereby NOTIFIED of their APPARENT LIABILITY FOR FORFEITURE in the amount of three thousand dollars ($3,000) each for the apparent failure to provide required information on the Application in violation of Section 1.80(b)(2) of the Commission's Rules.

22. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL,* Luis A. Mejia and MSG 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.

23. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If 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).

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

25. 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.

26. 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, D.C. 20554.[46]

27. IT IS FURTHER ORDERED, pursuant to the authority delegated under 47 C.F.R. § 0.283, that the Petitions to Deny filed by Jose A. Rivera on September 10, 2008, and by Juan de Arsuante on September 19, 2008, ARE DISMISSED.

[46] *See* 47 C.F.R. § 1.1914.

28. IT IS FURTHER ORDERED that that the application (File No. BALH-20070820AGE) of MSG Radio, Inc., for assignment of license for station WIAC-FM, San Juan, Puerto Rico, from Luis A. Mejia IS GRANTED.

29. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Luis A. Mejia, c/o Francisco R. Montero, Esq., Fletcher, Heald & Hildreth, PLC, 1300 N. 17th Street, 11th Floor, Arlington, VA 22209, and to MSG Radio, Inc., c/o Lewis J. Paper, Esq., Dickstein Shapiro, LLP, 1825 Eye Street, N.W., Washington, DC 20006. A copy also shall be sent to Madifide, Inc., c/o Anthony T. Lepore, Esq., Anthony T. Lepore, Esq., PA, P.O. Box 823662, South Florida, FL 33082.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau