

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

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In the Matter of)
)
Liability of Macau Traders, Inc.)
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Licensee of WVPI(FM))
Charlotte Amalie, St. Thomas)
United States Virgin Islands)
)
For a Forfeiture)

**MEMORANDUM OPINION AND ORDER
AND FORFEITURE ORDER**

Adopted: December 29, 1997

Released: January 8, 1998

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority has before it for consideration: (1) a June 27, 1996 Notice of Apparent Liability ("NAL") for forfeiture in the total amount of \$15,000, issued to Macau Traders, Inc. ("Macau"); and (2) Macau's response thereto submitted on August 8, 1996.¹ Macau, the licensee of WVPI(FM), Charlotte Amalie, St. Thomas, United States Virgin Islands, requests that the forfeiture be rescinded or alternatively, substantially reduced. For the reasons that follow, we grant Macau's request in part and reduce the forfeiture to \$1,000 based solely on an unauthorized assumption of station control by Macau, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b).

Background

2. In the NAL, we determined that Macau had engaged in an unauthorized assumption of control of Station WVPI(FM), in violation of 47 U.S.C. § 310(d) and 47 C.F.R. § 73.3540. These violations occurred in connection with Macau's operation of the station prior to the Commission's grant of the application assigning the license from John J. Ellis, Trustee ("Trustee") to Macau. We also found that Macau had violated the Commission's multiple ownership rules. 47 C.F.R. § 73.3555(a). This violation was based on Macau brokering

¹The call sign of WIYC(FM) was changed to WVPI(FM) on February 3, 1997.

substantially all of the broadcast time on WVPI(FM) from June 17, 1993 to September 15, 1995. Jonathan Cohen, a Macau principal, also holds attributable interests in WJKC(FM), Christiansted, St. Croix, and WVN(X)(FM), Charlotte Amalie, St. Thomas, stations whose relevant contours overlap the relevant contour of WVPI(FM). Under the rules then in effect, Cohen's brokering of WVPI(FM) created an impermissible interest in a third FM station within the same market.²

3. In its response to the NAL, Macau contends that the \$10,000 forfeiture for the unauthorized assumption of control of WVPI(FM) was arbitrary, capricious, and inconsistent with Commission precedent. Specifically, Macau asserts that the NAL failed to consider actions taken in accordance with the bankruptcy court's mandate, contrary to Commission policy. *See Phoenix Broadcasting Co.*, 44 FCC 2d 838, 840 (1973); *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974). Macau argues that the May 25, 1993 Management Agreement, which contained questionable provisions concerning station control was terminated on July 24, 1993, upon the advice of subsequently-retained communications counsel. Macau asserts that Trustee participated in WVPI(FM)'s key programming and personnel decisions following termination of the Management Agreement. According to Macau, keeping the station on the air served both the public's and creditors' interests. Because the Trustee had no broadcast experience, the Trustee reasonably selected Macau as a management company to operate the station subject to his oversight. As a result, Macau argues that the circumstances confronting the parties were substantially similar to those in *Mark R. Nalbene, Receiver*, 6 FCC Rcd 7529 (1991), where no unauthorized assumption of control was found to have taken place.

4. Macau also argues that the NAL ignored important mitigating factors regarding the multiple ownership rule violations. First, Macau states that the decision to enter into a time brokerage agreement which permitted the simulcasting of WJKC(FM) was made with the Trustee's permission as a low cost temporary remedy to resolve interference problems with WVPI(FM)'s satellite feed. Macau explains that it commenced simulcasting in June 1993 without a long term contract because the auction of WVPI(FM) was scheduled for July 1993. Thereafter, as the winning bidder, Macau decided to wait until the assignment application was approved by the Commission to make further programming changes, but did not anticipate this would take over two years.³ Second, Macau claims that based on a 1991 letter decision issued in an unrelated proceeding, it believed that WJKC(FM) and WVPI(FM) served separate markets. In addition, Macau claims the prohibited overlap occurred over water, which prior to 1992 rule revisions had been deemed to be non-cognizable by the Commission in *Tidewater Broadcasting*

²Although the programming supplied was simulcast from Cohen's Station WJKC(FM), Christiansted, St. Croix, the simulcasting of that particular station's programming was not the basis for the cited rule violation. Where the principal community contours of two stations overlap and a party with an attributable interest in one station, like Cohen, brokers at least 15 percent of the time on a second station, former Section 73.3555(a)(2)(i), now Section 73.3555(a)(3)(i), treats such a party as having an attributable interest in the brokered station regardless of the programming's source.

³File No. BALH-930921GH.

Co., Inc., 2 FCC 2d 364, 365 (1966).⁴ Third, Macau notes that the NAL failed to consider that WVN(FM), in which Cohen had an attributable interest, was an unbuilt facility throughout the relevant period. Macau contends that the delay in processing its application, coupled with the parties' complete candor with the Commission in this matter, does not support the imposition of a fine even if the finding of a multiple ownership rule violation is sustained.

5. Macau also asserts that the NAL failed to recognize that the assessed forfeiture would impose an undue hardship upon Macau. Macau claims it has no other assets apart from the station, and incurred station reconstruction costs of \$72,000 as a result of hurricane damage in September 1995. Macau further argues that the unblemished prior broadcasting record of Macau's principals was not considered in the NAL and that given the overall circumstances of the case, no monetary forfeiture is warranted.

Discussion

6. We have reexamined the forfeiture imposed in view of the statutory factors set forth in Section 503(b)(2)(D) of the Communications Act of 1934, as amended, and we have reevaluated the nature, circumstances, extent and gravity of the violations. Although we reaffirm the prior finding that a premature and unauthorized assumption of station control took place in the instant case, we find that mitigating factors support a substantial reduction in the proposed forfeiture, from \$10,000 to \$1,000 for this violation. We also conclude that the multiple ownership rule violation, when considered under the unusual circumstances of this case, warrants an admonishment but not a monetary forfeiture.

7. With regard to the issue of unauthorized assumption of control, we find little merit to Macau's response that the NAL improperly "downplayed" evidence which demonstrates that the Trustee remained in control of the station after July 24, 1993. Macau admittedly managed the station for over two years, and further recognized that certain provisions of the Management Agreement were improper.⁵ Although Macau now reasons that the Trustee reacquired station control at the Agreement's expiration on July 24, 1993, Macau's acknowledgement that it did not enter into a revised written agreement *at any time* subsequent thereto casts doubt on whether the prohibited practices were ever appropriately rectified. Moreover, the more reliable record evidence indicates that Macau was in control of the station throughout the time in question. In this regard, we note that Macau still has not addressed, and we cannot ignore, the Trustee's

⁴*Revision of Radio Rules and Policies* in MM Docket 91-140, 7 FCC Rcd 2755 (1992) (subsequent history omitted).

⁵The Management Agreement provided in pertinent part that (1) Macau "will be solely responsible for the management and operation of [WVPI]; (2) Macau will "pay all debts and other obligations incurred by [WVPI]" from May 21, 1993 to termination of the contract; (3) Macau will sell advertisements and promote the station; (4) Macau will collect all receivables and own all receivables collected after March 23, 1993; (5) Ellis "shall not be responsible for any monetary obligations of [WVPI]" during the contract term; and (6) that Macau will provide Ellis "with such information as may be necessary for him to perform his obligations under the bankruptcy code."

response to the staff's October 6, 1995, inquiry letter in which he conceded that he was "not personally familiar" with important operational facts concerning the station, which he deemed to be within Macau's knowledge and responsibility.⁶ Finally, contrary to Macau's contention, the NAL carefully weighed the representations made by Macau concerning the character and extent of the Trustee's participation in the station's affairs against other conflicting evidence.⁷ In view of this, we give little weight to Macau's present assertions that the Trustee controlled the station during the period July 24, 1993 through September 15, 1995.

8. Macau has also failed to explain how the station's personnel could have remained under the Trustee's control in view of his admission that they were on the payroll of Radio 95, Inc., a corporate entity controlled by Cohen. Although the Commission has recognized that delegation of control to a prospective assignee does not establish a premature transfer of control where the payroll was administered in compliance with state unemployment law, Macau has not supplied any evidence that a similar circumstance compelled the payroll arrangement used by Macau through September 1995.⁸ See *Mark R. Nalbone, Receiver*, 6 FCC Rcd at 7534. We also do not find that this case is sufficiently analogous to *Mark R. Nalbone, Receiver* to conclude that no unauthorized assumption of control occurred. On the contrary, we find that Macau assumed control without Commission authorization from the time Macau entered into the Management Agreement with the Trustee. Consequently, the NAL appropriately determined there was an unauthorized assumption of station control by Macau.

9. Macau requests that if the finding of an unauthorized assumption of control of WVPI(FM) is affirmed, a rescission or substantial reduction of the forfeiture is appropriate considering the station's bankruptcy. In this regard, we note that the NAL did not sufficiently consider the bankruptcy circumstance attending this case. The record establishes that the estate was without operating assets of its own. Macau states it operated the station with its own funds with the intent of keeping the bankrupt station on the air to benefit the public interest, and the

⁶Although Macau now claims that the Trustee operated the station in conformance with Commission policies subsequent to the purported termination of the Management Agreement on July 24, 1993, the Trustee, in his October 6, 1995 response to our letter of inquiry raises substantial doubt about that claim. In his response, the Trustee indicated only that "WYIC has been operating under a management agreement which I entered into with Macau Traders, Inc.," without reference to any termination or modification of the original agreement.

⁷Moreover, as observed in the NAL, Macau's general statements that the Trustee remained in control of the station's finances, personnel and programming "do not substitute for evidence" supporting the probity of such claims.

⁸We note that the bankruptcy judge in this case, in contrast to *Mark R. Nalbone, Receiver, supra*, did not direct the proposed assignee to become financially responsible for the station or its personnel. In this case, the Trustee requested, by Motion dated June 4, 1993, that the court approve his proposal to employ Macau to manage the station's day-to-day operations. That Motion, according to Macau, was thereafter granted by oral bench ruling. See Consolidated Opposition to Petition to Deny, Exhibits B, B-1, B-2, B-3.

interest of creditors of the estate, as an operating station would attract higher bids.⁹ These actions, by Macau as interim operator, were undertaken with the approval the Bankruptcy Court and under the supervision of the Trustee. We acknowledge that the Commission has permitted prospective purchasers or their principals to furnish funds and act in varying station management capacities in similar circumstances in order to assure continuation of service. See *Daniel Forrestall, Receiver*, 8 FCC Rcd 884, 888 (Vid. Serv. Div., 1993) (citing *Phoenix Broadcasting Co.*, 44 FCC 2d 838, 840 (1973)). Accordingly, we agree that in the present case it is appropriate to consider the station's bankruptcy as a mitigating factor when determining the forfeiture amount. It is also the case that Macau had a previously unblemished licensee record. We conclude that the proposed forfeiture should be reduced from \$10,000 to \$1,000. 47 U.S.C. 503(b)(2)(D); See *CanXus Broadcasting Corp.*, 7 FCC Rcd 3874 (1992), recon. granted in part, 8 FCC Rcd 4323 (1993) *aff'd*, 10 FCC Rcd 9950 (1995) (\$10,000 forfeiture for unauthorized assumption of control reduced to \$1,000 where the prospective purchaser attempts to keep a severely financially distressed station on the air).

10. With respect to the multiple ownership rule violation, Macau erroneously relied on a waiver granted to another broadcaster under the former rules as its basis for asserting that Cohen was in compliance with local ownership limits. Local radio markets which overlap only over water are not excluded from the rule. 47 C.F.R. § 73.3555(a). It was also inappropriate for Macau to enter into and operate under a brokerage arrangement requiring a rule waiver from the Commission *before* first obtaining it. Moreover, it is undisputed that principal community contours of a non-operational station in which a party holds an attributable interest is taken into account in defining a local radio market, the number of stations in such a market, and the number attributable to such party. *Implementation of Section 202(a) and 202 (b)(1) of the Telecommunications Act of 1996, (Broadcast Radio Ownership)*, 11 FCC Rcd 12368 (1996). Nonetheless, we find it relevant that one of the stations attributable to Cohen, WVN(X)FM, was an unbuilt facility throughout the relevant period, so that the competitive harm sought to be precluded by the rule was never actually experienced in this case. Furthermore, Macau candidly revealed the ownership interests of its principals, as demonstrated through its original multiple ownership rule waiver request. Consequently, we find that this rule violation does not warrant the assessment of a monetary forfeiture and conclude that an admonishment of Macau is sufficient.¹⁰

⁹As Macau notes, it had no way of guaranteeing it would be the highest bidder at the bankruptcy auction. In fact, Macau initially withdrew its winning bid due to conflicts with the Trustee's contract for conditions regarding the sale and Commission rules. Macau decided to exercise its right to purchase the station after the second highest bidder also withdrew.

¹⁰As noted in the NAL, the multiple ownership issue has since been made moot due to the recent rule revisions, which, among other things, raised the number of commonly owned, same-service stations that a licensee may hold in a single market. See Section 202, Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

11. No further reduction in the forfeiture is warranted. Although Macau insists that the original \$15,000 forfeiture would pose an undue financial hardship, it has provided no documentary evidence upon which we could evaluate its financial condition and its ability to pay either that, or any lesser amount.

Conclusion

12. In view of the foregoing, IT IS ORDERED, That Macau's August 8, 1996 response to our June 27, 1996 NAL in the amount of \$15,000 IS GRANTED in part, and DENIED in part. IT IS FURTHER ORDERED, That the Monetary Forfeiture for violation of the multiple ownership rules is HEREBY RESCINDED. Macau Traders, Inc. is instead hereby ADMONISHED for its violation of 47 C.F.R. § 73.3555(a). IT IS FURTHER ORDERED, That pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), Macau Traders, Inc. FORFEIT to the United States the sum of One Thousand Dollars (\$1,000) for the willful violation of Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), and 47 C.F.R. § 73.3540.

13. Macau Traders, Inc. may take any of the steps outlined in the attachment to this order regarding payment of the forfeiture pursuant to Section 1.80 of the Commission's Rules. The Mass Media Bureau will send by Certified Mail -- Return Receipt Requested, copies of this Memorandum Opinion and Order and Forfeiture Order to Macau Traders, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau