

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

In the Matter of)	
)	
BEAR VALLEY BROADCASTING, INC.)	File No. 99100489
)	NAL/Acct. No. 20013208006
Proposed Assignee of Low Power Television)	Facility #63149
Station K06MU, Big Bear Lake, California)	JWS
)	

FORFEITURE ORDER

Adopted: December 18, 2000

Released: December 20, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order, we find that Bear Valley Broadcasting, Inc. (“Bear Valley”) violated section 310(d) of the Communications Act of 1934, as amended (the “Communications Act” or the “Act”), and section 73.3540(a) of the Commission’s rules by willfully and repeatedly assuming *de facto* control of the K06MU license without obtaining prior Commission approval.¹ Based on our review of the facts and circumstances of this case and after considering Bear Valley’s response to our Notice of Apparent Liability (“NAL”) in this matter,² we conclude that Bear Valley is liable for a forfeiture in the amount of eight thousand dollars (\$8,000).

II. BACKGROUND

2. On September 17, 1999, K.I.D.S. – TV6³ and Bear Valley entered into an agreement to sell the K06MU license and station facilities to Bear Valley. On September 19, 1999, those parties also entered into an “Interim Management Agreement.” The term of the agreement was through November 30, 1999, but Bear Valley could “extend the term for such time as is necessary to obtain the approval” for the assignment of the license to Bear Valley. Under the agreement, Bear Valley acquired “full and complete power and exclusive authority to conduct, on behalf of [the licensee], all business operations and transactions on or pertaining to” K06MU. The agreement also provided that Bear Valley (1) receives all monies derived from station operations, except for certain insurance benefits, (2) has the right to establish all policies for the television station, (3) can employ personnel for the operation of the station, and (4) can make whatever changes to the station’s property or equipment that it deems appropriate. Bear Valley also

¹ 47 U.S.C. § 310(d); 47 C.F.R. § 73.3540(a).

² *Bear Valley Broadcasting, Inc.*, Notice of Apparent Liability for Forfeiture, DA 00-2359 (Enf. Bureau, released October 20, 2000).

³ The seller was originally named “American Sports Kids Association.” The agreement was later amended to substitute K.I.D.S. – TV6 as the seller.

assumed any loss that might result from the station's operation during the management agreement. K.I.D.S. – TV6 may terminate the management agreement only if Bear Valley files for bankruptcy or is placed in receivership, or if Bear Valley defaults on any material provision of the agreement, and the default is not cured within 60 days or such longer period as is reasonable.

3. Bear Valley acknowledges that under the management agreement, its principal, Robert Cartwright, controls the station's financial records and books, pays the station's operating expenses, and establishes the station's management. Mr. Cartwright and Bear Valley principal Jacque P. Montero interview, hire and fire station personnel, establish station management, and maintain the programming format (which is the same format used by K.I.D.S. – TV6). Bear Valley pays a contract engineer to maintain the station's facilities.

4. On December 22, 1999, Chuck Foster, the principal of K.I.D.S. – TV6, pled guilty in the Superior Court, State of California, County of San Bernardino, to a criminal charge of felony insurance fraud. *See People v. Chuck Foster*, Case No. FVI009947. Mr. Foster was incarcerated in state prison. On February 9, 2000, Mr. Foster was sentenced to two years in prison (with credit for time previously served). Bear Valley states that prior to Mr. Foster's incarceration, Mr. Cartwright and Mr. Foster discussed the station's operations on almost a daily basis. As of June 22, 2000, Mr. Cartwright had not received permission to visit Mr. Foster in prison, although they had spoken on the telephone "on a number of occasions." *See Bear Valley June 23, 2000 Response to Letter of Inquiry, Response 3.*

5. K.I.D.S. – TV6 and Bear Valley filed an application for the Commission's consent to assign the K06MU license to Bear Valley on January 12, 2000 (File No. BALTVL-20000112ABO). That application remains pending.

6. We concluded in the NAL that Bear Valley had apparently violated the Act and our rules by willfully assuming *de facto* control of the station by virtue of the management agreement and the actual conduct of the parties, which reflect that Bear Valley actually set station policies and that Mr. Foster had no role in the station's operation. We further concluded that Bear Valley's apparent violation warranted the base forfeiture established by the Commission for an unauthorized substantial transfer of control.

7. In its response to the NAL, Bear Valley contends that its "violation was minor when viewed in the context in which it occurred." Pointing to Mr. Foster's arrest and subsequent incarceration, Bear Valley asserts that the station's affairs were "thrown into disarray" and that its "principals stepped in to save the station from imminent demise." Bear Valley requests a reduction in the proposed forfeiture.

III. DISCUSSION

8. Section 310(d) of the Act provides in pertinent part:

No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit license, 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.

Similarly, section 73.3540(a) of the Commission's rules, 47 C.F.R. § 73.3540(a), provides, "Prior consent of the FCC must be obtained for a voluntary assignment or transfer of control."

9. We traditionally look beyond the legal title to whether a new entity or individual has obtained the right to determine the basic operating policies of the station in ascertaining whether a transfer of control has occurred. *See WHDH, Inc.*, 17 FCC 2d 856 (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). Specifically, we look to three essential areas of station operation: programming, personnel and finances. *See, e.g., Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), *recon. denied*, 50 RR 2d 1346 (1982). A licensee may delegate certain functions on a day-to-day basis to an agent or employee, but such delegation cannot be wholesale. *See, e.g., Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981). That is, those persons assigned a task must be guided by policies set by the permittee or licensee. *See David A. Davila*, 6 FCC Rcd 2897, 2899 (1991). Moreover, the standards by which we measure control are equally applicable to situations involving “time brokerage” or “management agreements.” *Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534, 8538 (1997).

10. We find, and Bear Valley essentially acknowledges, that it assumed *de facto* control of the station through the management agreement with K.I.D.S. – TV6. The terms of the management agreement and the actual conduct of the parties show that Bear Valley set station policies, as opposed to simply managing the station under Mr. Foster’s direction. Under the agreement, Bear Valley has “full and complete power and exclusive authority” to operate the station. Moreover, Bear Valley assumed all of the financial risks and the financial benefits from the operation of the station. All of the station’s employees are Bear Valley’s employees, and Bear Valley has the exclusive right to set personnel policies for the station. Thus, upon implementation of the agreement, Mr. Foster ceased having any meaningful role in the station’s operation. Thus, well before the filing of the assignment application - an application that has yet to be granted - Mr. Foster had ceded control of the station to Bear Valley. Moreover, it is beyond dispute that, upon his incarceration, Mr. Foster ceased having any role whatsoever. In view of the foregoing, we conclude that Bear Valley acquired ultimate control over station operations without prior Commission approval.

11. Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and section 1.80(a) of the Commission’s rules, 47 C.F.R. § 1.80(a), each state that any person who willfully or repeatedly fails to comply with the provisions of the Communications Act or the Commission’s rules shall be liable for a forfeiture penalty. For purposes of section 503(b) of the Communications Act, the term “willful” means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission’s rules. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). Furthermore, a continuing violation is “repeated” if it lasts more than one day. *Id.*, 6 FCC Rcd at 4388.

12. The Commission’s Forfeiture Policy Statement sets a base forfeiture amount of \$8,000 for an unauthorized substantial transfer of control. *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission’s Rules*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied* 15 FCC Rcd 303 (1999). That base amount may be adjusted downward if the violation is deemed “minor” in nature. *See* section 1.80(b)(4) and accompanying note, 47 C.F.R. § 1.80(b)(4). After considering all of the circumstances, we believe that the violation is not minor and that the proposed forfeiture should be imposed. Bear Valley acquired control well before Mr. Foster’s arrest and incarceration and well before the filing of its assignment application. Bear Valley’s assertion that it acted in order to “save the station from imminent demise” does not justify its actions nor mitigate the significance of its violation. *See Kenneth Paul Harris, Sr.*, DA 00-2741 at ¶ 6 (Enf. Bureau, released December 6, 2000).

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED THAT, pursuant to section 503(b) of the Act, 47 U.S.C. § 503 and section 1.80(f)(4) of the Commission’s rules, 47 C.F.R. § 1.80(f)(4), Bear Valley Broadcasting, Inc. is

LIABLE FOR A FORFEITURE in the amount of eight thousand dollars (\$8,000) for willfully and repeatedly violating section 310(d) of the Act, 47 U.S.C. § 310(d), and section 73.3540(a) of the Commission's rules, 47 C.F.R. § 73.3540(a).

14. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, within thirty days of the release of this Forfeiture Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act, 47 U.S.C. § 504. Bear Valley Broadcasting, Inc. may pay the forfeiture by mailing a check or money order, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. referenced above. A request for payment of the full amount of this Forfeiture Order under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 12th Street, S.W., Washington, D.C. 20554.⁴

15. IT IS FURTHER ORDERED THAT a copy of this Forfeiture Order shall be sent by Certified Mail Return Receipt Requested to Bear Valley Broadcasting, Inc., in care of Howard J. Barr, Esq., Pepper & Corazzini, LLP, 1776 K Street, N.W., Suite 200, Washington, D.C. 20006-2334.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

⁴ See 47 C.F.R. § 1.1914.