

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Notice of Apparent Liability for Forfeiture of) Control No. 9805196(c)
KEOT, Inc.) NAL/Acct No. X32080002
Licensee of FM Broadcast Station KEOT(FM),)
St. George, Utah, Facility ID # 18140)

FORFEITURE ORDER

Adopted: January 12, 2001

Released: January 17, 2001

By the Chief, Enforcement Bureau:

I. Introduction

1. In this Forfeiture Order, we issue a monetary forfeiture in the amount of eight thousand dollars (\$8,000) against KEOT, Inc., licensee of broadcast station KEOT(FM), St. George, Utah, for willful and repeated violation of Section 310(d) of the Communications Act of 1934, as amended ("Act"),¹ and Section 73.3540 of the Commission's rules.² The noted violations involve an unauthorized substantial transfer of control of KEOT, Inc.

II. Background

2. Station KEOT(FM),³ then licensed to EAR, Inc., a predecessor to the present licensee, commenced operation in November 1994. At that time, the stock of EAR, Inc., was owned by Floyd Ence (50 percent) and Lavon Randall (50 percent). In May 1996, Ence's interest was transferred to the Bear River Trust ("Trust"), the sole beneficiary of which is Morgan Skinner.⁴ This transaction was reported to

¹ 47 U.S.C. § 310(d).

2 47 C.F.R. § 73.3540.

³ The station's call letters were previously KCLG(FM) (effective February 21, 1991), KFMD(FM) (effective November 27, 1992), KSGI-FM (effective August 1, 1993), and KZEZ(FM) (effective June 1, 1996). The present call letters became effective June 5, 1998.

⁴ The record reflects that Skinner originally controlled the Trust as both the trustee and the beneficiary. In an Ownership Report filed by the licensee dated June 30, 1997, the licensee reported that John Allen had

the Commission in an Ownership Report (FCC Form 323) dated June 30, 1996. However, no Commission approval was sought for the transaction at that time.

3. On November 5, 1997, the licensee filed an application seeking approval of a *pro forma* transfer of control of the licensee from Randall and the Trust to Legacy Communications, Inc ("Legacy") (File No. BTCH-971105EC). In the course of processing the application, the Commission staff raised questions concerning prior changes in the ownership of the KEOT(FM) licensee and other related licensees. As a result, the licensee filed on December 12, 1997, an application seeking approval, after the fact, for the 1996 transfer of Ence's interest to the Trust (File No. BTCH-971202GH). Thereafter, on February 20, 1998, the licensee filed an amendment to that application, which was executed by Randall ("Randall Amendment"). The amendment conceded that the licensee had not timely filed an appropriate transfer of control application for approval of the acquisition of 50 percent control by the Trust in May 1996. The amendment indicated that the failure to seek approval was the result of inadvertence and the belief on Skinner's part that a transfer of control would not occur unless one party acquired a 51 percent interest in the license. The amendment also indicated that Randall, who lacked prior broadcast experience, has provided funding for this and related stations. Skinner, whose principal trade is broadcast station management, has been responsible for day-to-day operation of the stations.

4. On March 3, 1998, the Commission granted the application seeking belated approval of the Trust's interest in the licensee "without prejudice to whatever further action, if any, may be appropriate with respect to the matter of unauthorized control as set forth in the [Randall Amendment]." As a result, it also granted the application for approval of the *pro forma* transfer of control to Legacy. Thereafter, the former Enforcement Division of the Mass Media Bureau⁵ directed two letters of inquiry to the licensee dated July 22, 1998, and May 26, 1999, concerning the ownership of this and related stations. The licensee responded to the first letter of inquiry on August 26, 1998, and supplemented that response on December 2, 1998, and January 20, 1999. The licensee responded to the second letter of inquiry on June 14, 1999.

5. On February 10, 2000, the Chief, Enforcement Bureau, released a *Notice of Apparent Liability for Forfeiture* to KEOT, Inc. in the amount of \$8,000 based on an apparent unauthorized transfer of control of that licensee. *KEOT, Inc.*, 15 FCC Rcd 2710 (Enf. Bur. 2000) ("NAL"). The NAL found that the Trust's acquisition of a 50 percent interest in the licensee constituted a substantial transfer of control under Section 310(d) of the Act and Section 73.3540 of the Commission's rules and that the licensee violated the requirements of those provisions by failing to seek and obtain Commission approval prior to the implementation of the transaction. It also found that the failure continued from May 1996 to March 3, 1998, the date when approval of the acquisition was ultimately granted, and was therefore repeated. It further found that the violations were willful.

become the trustee. However, Skinner created the Trust for estate planning purposes. Skinner remains the beneficiary of the Trust and continues to manage its affairs. Moreover, Allen serves as trustee at Skinner's election, primarily so that there will be someone to operate the Trust if Skinner dies or becomes incapacitated. Accordingly, the evidence indicates that Skinner controls the Trust.

⁵ The duties of the former Enforcement Division of the Mass Media Bureau have since been assumed, in pertinent part, by the Enforcement Bureau.

6. The *NAL* found that there was no evidence that the failure was the result of an intent to evade the applicable requirement or to conceal facts from the Commission because the licensee reported the Trust's interest in an Ownership Report. It nonetheless found that the violations continued for a substantial period of time and were ultimately corrected only because of the filing of an application seeking approval of an unrelated transfer of control. It further noted that Skinner was an experienced broadcaster who should have been aware of the need to make serious efforts to determine whether the transaction required Commission approval. Based on these considerations, the *NAL* concluded that a forfeiture in the amount of \$8,000 was warranted. This is the base amount for an unauthorized substantial transfer of control pursuant to *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997) ("Forfeiture Guidelines").

7. On March 13, 2000, the licensee filed a pleading captioned "Petition for Reconsideration." We will treat this pleading as a response to the *NAL* pursuant to Section 1.80(f)(3) of the Commission's Rules.⁶ A notice of apparent liability is not a final order and is therefore not subject to a petition for reconsideration.⁷ In its response, the licensee admits that a transfer of control occurred, which it characterizes as "technical." However, it urges that there are mitigating factors that warrant rescission of the forfeiture assessed by the *NAL*.

8. The licensee initially contends that little, if any, change in the operation of the station occurred as a result of Skinner's acquisition of a 50 percent voting interest. On the one hand, it suggests that Randall remained in actual control of the station because Skinner would ultimately defer to Randall, in recognition of the fact that Randall had supplied the funding for the purchase of the station. Conversely, the licensee argues that there was no "change" of day-to-day "control" because the station remained under the day-to-day management of Skinner, in consultation with Randall, both before and after the transfer to Skinner.

9. The licensee next urges that its violation should be considered minor because it did not involve the substitution of an entire new set of owners. It was rather the product of an inadvertent mistake on Skinner's part based on his belief that Commission approval would be required only if 51 percent or more of the ownership were transferred.

10. The licensee further contends that it exhibited good faith by voluntarily disclosing the ownership change in an Ownership Report as well as in the transfer of control applications it filed in 1997. It claims that these considerations warrant a reduction in the forfeiture, citing *The Hinton Telephone Company of Hinton, Oklahoma, Inc.*, 8 FCC Rcd 5176 (1993) ("Hinton") and *Weston Properties XVII Limited Partnership*, 8 FCC Rcd 1783 (1993) ("Weston").

11. The licensee next contends that the forfeiture is unwarranted because of its history of overall compliance. It premises its claim to an "exemplary" past record on the fact that KEOT, Inc., has not been the subject of any prior forfeiture.

⁶ 47 C.F.R. § 1.80(f)(3).

⁷ 47 C.F.R. § 1.106(a).

12. The licensee finally contends that the amount of the forfeiture assessed by the *NAL* is inconsistent with forfeitures assessed in similar circumstances in *Radio Moultrie, Inc.*, 8 FCC Rcd 4266 (Mass Media Bur. 1993) ("*Moultrie*") and *Telecourier Communications Corp.*, 9 FCC Rcd 1736 (Mobile Services Division, CCB 1994). The licensee contends that these cases involved comparable acquisitions of a 50 percent ownership interest.

III. Discussion

13. The licensee does not dispute the violations found in the *NAL*. It rather urges that there are mitigating factors that warrant the rescission of the forfeiture. In examining these claims, we must take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act, which include 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 other such matters as justice may require. Having considered the licensee's response in light of these factors, we find no mitigating evidence that would warrant a reduction or waiver of the forfeiture.

14. With reference to the licensee's claim that the unauthorized transfer of a *de jure* 50 percent interest to Skinner's Trust should be ignored because Skinner typically deferred to Randall, this is without merit because the Trust's acquisition of a 50 percent voting interest gave Skinner the legal right to proceed otherwise, whatever his past practice may have been. Moreover, this assertion is inconsistent with the licensee's further contention that no significant transfer of control should be found because Skinner had exercised operational day-to-day control of the station, albeit in consultation with Randall, both before and after the Trust's acquisition of its 50 percent voting interest. This second contention also fails to mitigate the licensee's failure because the acquisition of a 50 percent interest by Skinner or his Trust, whether by direct or indirect means, would have required Commission approval prior to its implementation. Ultimately, as found in the *NAL* and as the licensee does not dispute, the Trust's acquisition of a 50 percent voting interest in the licensee constituted a substantial transfer of control under the Act, the Commission's rules and Commission precedent, and there is no basis to dismiss such a substantial transfer as "minor."

15. We also do not find Skinner's erroneous belief that a transfer of control would occur only if 51 percent of the stock changed hands to be a mitigating factor. The *NAL* also noted the fact, which the licensee does not dispute, that Skinner is an experienced broadcaster who should have been aware of the need to make serious efforts to determine whether the proposed transaction required Commission approval. "Licensees are expected to know and comply with the Commission's rules, and will not be excused for violations thereof, absent clear mitigating circumstances." *Sitka Broadcasting Co., Inc.*, 70 FCC 2d 2375, 2378 (1979), citing *Lowndes County Broadcasting Co.*, 23 FCC 2d 91 (1970) and *Emporium Broadcasting Co.*, 23 FCC 2d 868 (1970).

16. With respect to the fact that the licensee disclosed the transaction in an Ownership Report, the *NAL* found only that this consideration militated against a finding that the licensee intended to evade the applicable requirement or to conceal facts from the Commission. However, this does not, standing alone, mitigate the violation because the licensee merely provided information concerning its ownership required by the pertinent form. It did not voluntarily disclose that a violation had occurred. Moreover, as the *NAL* found and the licensee does not dispute, the violations continued for a significant period of time and were

ultimately corrected only because of the filing of an application seeking approval of an unrelated transfer of control, rather than by any voluntary initiative on the licensee's part.

17. The precedent relied upon by the licensee do not warrant a contrary finding. *Hinton* involved a *pro forma*, rather than substantial, transfer of control. *Weston* involved a transfer of control that resulted from a management agreement that the Commission found to result in an abdication of control by the licensee of record. The licensee believed that the ownership arrangement was justified under Commission precedent because the station was experiencing serious financial difficulties. Further, because the transaction involved a management agreement rather than the transfer of an ownership interest, the illegality of the transaction was not readily apparent on its face. The transfer in this case involves an unambiguous transfer of *de jure* control of the licensee and occurred principally because of carelessness on the part of Skinner. Moreover, the licensee in *Weston* was assessed the same forfeiture proposed in the *NAL*. Although a higher base amount (\$20,000) was in effect at the time *Weston* was decided, there is no basis for the apparent assumption of the licensee here that it should be entitled to a *pro rata* reduction from the much lower base amount prescribed by the current *Forfeiture Guidelines*.

18. We further disagree with the licensee's contention that the forfeiture should be waived because of the licensee's "exemplary" record of compliance. In fact, we have concluded investigations of two other licensees controlled by Randall and Skinner in which we found that the licensees engaged in unauthorized substantial transfers of control.⁸ The licensee in one of these investigations admitted the occurrence of the violation. In addition, in another investigation, we concluded that a licensee controlled by Randall and Skinner engaged in the operation of a radio station without a license, which the licensee did not dispute.⁹

19. We accordingly find that the licensee has failed to identify mitigating circumstances justifying cancellation or reduction of the forfeiture amount proposed in the *NAL*. This conclusion is not inconsistent with precedent cited by the licensee. *Moultrie* involved a substantial transfer of a 50 percent interest. The Chief, Mass Media Bureau, found that circumstances described by the licensee warranted a reduction from the then applicable base forfeiture amount of \$20,000. The circumstances are not precisely described, as reflected in an earlier decision in the proceeding.¹⁰ However, for the reasons discussed, we do not believe that the circumstances here warrant a reduction from the base amount now in effect pursuant to the *Forfeiture Guidelines*. *Telecourier* involved a *pro forma*, rather than substantial, transfer of control because the persons who acquired a 50 percent interest had previously held a 25 percent interest. Therefore, we affirm the forfeiture amount of eight thousand dollars (\$8,000).

⁸ *KGNT, Inc.*, 15 FCC Rcd 5806 (Enf. Bur. 2000); *KNFL, Inc.*, DA 00-2450 (Enf. Bur. November 1, 2000).

⁹ *KNFL, Inc.*, 15 FCC Rcd 10286 (Enf. Bur. 2000), *recon. denied* DA 00-2285 (Enf. Bur. October 10, 2000).

¹⁰ *Radio Moultrie, Inc.*, 8 FCC Rcd 104 (Mass Media Bur. 1993).

IV. Ordering Clauses

20. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,¹¹ and Section 1.80(f)(4) of the Rules,¹² KEOT, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars (\$8,000) for willfully and repeatedly violating Section 310(d) of the Communications Act of 1934, as amended,¹³ and Section 73.3540 of the Commission's rules.¹⁴

21. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules¹⁵ within 30 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.¹⁶ Payment may be made by mailing a check or similar instrument, payable to the order of the "Federal Communications Commission," to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. X32080002. Requests for full payment under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 12th Street, S.W., Washington, D.C. 20554.¹⁷

22. **IT IS FURTHER ORDERED** that a copy of this *Forfeiture Order* shall be sent by Certified Mail -- Return Receipt Requested -- to: Lavon Randall, President, KEOT, Inc., 210 North 1000 East, P.O. Box 1450, St. George, Utah 84770.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹¹ 47 U.S.C. § 503(b).

¹² 47 C.F.R. § 1.80(f)(4).

¹³ 47 U.S.C. § 310(d).

¹⁴ 47 C.F.R. § 73.3540.

¹⁵ 47 C.F.R. § 1.80.

¹⁶ 47 U.S.C. § 504(a).

¹⁷ See 47 C.F.R. § 1.1914.