

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

In the Matter of)
)
DANVILLE TELEVISION PARTNERSHIP)
)
Licensee of Television Station)
WDRL-TV, Danville, Virginia)
FIN 15507)
)

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: April 27, 2001

Released: April 30, 2001

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division acting pursuant to delegated authority, has before it for consideration an investigatory record concerning the operation of station WDRL-TV, Danville, Virginia and the conduct of the reported principals of the licensee, Danville Television Partnership (Danville). For the reasons set forth below, we conclude that Danville willfully and repeatedly engaged in an unauthorized transfer of control of station WDRL-TV, in violation of Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), and Section 73.3540 of the Commission’s Rules. We have also determined that the appropriate sanction for this violation is a monetary forfeiture. Accordingly, this Order constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE against Danville, in the amount of ten thousand dollars (\$10,000), pursuant to Section 503(b) of the Communications Act and under authority delegated to the Chief, Video Services Division, by Section 0.283 of the Commission’s Rules.

Background

2. In June of 1992, Danville acquired the construction permit for now WDRL-TV (BAPCT-19920114KJ). That application reflected that the partnership was comprised of Caroline K. Powley, a 51% general partner, and Melvin N. Eleazer, a 49% general partner. Thereafter, a dispute arose concerning Ms. Powley’s interest in Danville and that controversy became one of the issues being litigated in local bankruptcy and chancery proceedings involving Danville and its principals.¹ In documents submitted and deposition testimony taken in

¹ On March 25, 1998, an involuntary petition for Chapter 7 bankruptcy was filed against Mr. Eleazer. Shortly thereafter that proceeding was converted into a Chapter 13, debtor-in-possession proceeding, and transferred to and consolidated with the Chapter 11 involuntary bankruptcy proceeding that Ms. Powley had instituted in the Danville, Virginia federal district court against Danville. Subsequently, on March 11, 1999, the bankruptcy (continued....)

those proceedings, allegations were made that Mr. Eleazer had transferred control of WDRL-TV without prior Commission approval to James Pridemore and had misrepresented and submitted forged or otherwise fraudulent documents to the Commission with respect to various applications he filed on behalf of WDRL-TV. Based upon these matters, which Ms. Powley brought to the Commission's attention in connection with a petition to deny she filed against translator station W54BT, Roanoke, Virginia,² the Mass Media Bureau's then-Enforcement Division directed Danville to respond to several questions set forth in its letter of February 9, 1999. Since these matters also raised the possibility that Ms. Powley, the putative 51% general partner, may have acquiesced in or condoned Mr. Eleazer's alleged wrongdoing or had failed to report these matters to the Commission in a timely and thorough manner, various questions were also directed to her. Thereafter, Mr. Eleazer and Ms. Powley submitted responses to the Enforcement Division's inquiry and to each other's filings.

Discussion

3. *Unauthorized Transfer of Control.* Section 310(d) of the Act prohibits the transfer of control of a station license, and any rights thereunder, without prior Commission consent. There is no exact formula by which control of a broadcast station can be determined. The Commission traditionally looks 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, it looks to three essential areas of station operation: programming, personnel and finances. See, e.g., Choctaw Broadcasting Corporation, 12 FCC Rcd 8534, 8538 (1997). 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 licensee. See David A. Davila, 6 FCC Rcd 2897, 2899 (1991).

4. Furthermore, the standards by which the Commission evaluates control are equally applicable to situations where time brokerage or local marketing or management

(Continued from previous page) _____

court found in Eleazer's Chapter 13 bankruptcy case, as well as in Danville's Chapter 11 bankruptcy case, that Ms. Powley did not fulfill her obligations as a partner, and that, therefore, a cognizable partnership never came into existence and Mr. Eleazer was the sole owner of Danville. On March 12, 1999, the bankruptcy court issued an order dismissing the Chapter 11 involuntary bankruptcy petition, since Danville was not a legal entity for bankruptcy purposes. The United States Federal District Court for Danville, Virginia affirmed the bankruptcy court's rulings on May 17, 2000. See Powley v. Eleazer and Danville Television Partnership, (Case No. 4:99CV00038). Ms. Powley's appeal to the United States Court of Appeals for the Fourth Circuit was dismissed on January 9, 2001, pursuant to a stipulation filed by the parties. See Powley v. Eleazer, Debtor and Laurence P. Morin and J. Glenwood Strickler, Trustees (Case No. 00-1819).

² The W54BT proceeding concerns an alleged unauthorized transfer of station control by Messrs. Eleazer and Pridemore. Concurrently, the Bureau has determined that the assessment of a monetary forfeiture is the appropriate sanction for the apparent violation of Section 310(d) of the Communications Act and Section 73.3540 of the Commission's Rules ascertained in that proceeding.

agreements (LMA) are in place. Choctaw Broadcasting Corporation, *supra*. In this regard, a licensee's participation in a time brokerage or local marketing agreement does not constitute *per se* evidence that an unauthorized transfer of station control, or violation of the Act or Commission rules, has occurred. See, e.g., WGPR, Inc., 10 FCC Rcd 8141 (1995), *vacated in part on other grounds sub nom. Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998); Roy F. Russo, Esq., 5 FCC Rcd 7586 (MMB 1990); Joseph A. Belisle, Esq., 5 FCC Rcd 7585 (MMB 1990). Instead, as noted above, the Commission looks to whether the licensee continues to have ultimate control over the station regarding its programming, personnel and finances. The Commission has specifically advised that:

Licensees engaged in [LMAs] . . . must operate . . . as a stand-alone entity discrete from the [LMA operator]. Thus, we require that licensees must maintain their own bank accounts, pay the salaries of their own employees, and remain responsible for their own obligations to programmers, utility companies, and other operational matters. In other words, the licensee should be ready and able to operate independently from the [LMA operator] at anytime [sic] it believes the arrangement does not fulfill its public interest responsibilities.

WGPR, Inc., 10 FCC Rcd at 8145.

5. After evaluating all of the relevant facts here, we conclude that the licensee has apparently engaged in an unauthorized transfer of control of WDRL-TV, which began in January 1996 when BIP/Channel 24 Productions, a company wholly owned by Mr. Pridemore, became the LMA operator for the station and continues to the present. We find particularly compelling the testimony of Mr. Pridemore in a deposition conducted December 9, 1997 in the chancery proceeding³ that WDRL-TV's licensee, Danville, played "no role in the station's operation" as a result of a local management agreement and equipment lease agreements between Danville and Mr. Pridemore. In this regard, Mr. Pridemore has directly paid all station expenses except for equipment leases (Powley Attachments 17 and 20, hereinafter "PA"). It does not appear that the licensee, Danville, has any employees of its own (PA 33), or has even maintained its own bank account or income tax identification number (PA 21). While Mr. Eleazer submits he has continued to be responsible for the programming, personnel and financial operations of WDRL-TV, he has done so only as a management employee of the LMA operator (PA 26; PA 29; Eleazer Exhibits 21 and 29 (hereinafter "EEX")). In view of these findings, we believe that a monetary forfeiture against the licensee is the appropriate sanction for the apparent violation of Section 310(d) of the Communications Act, as amended, and Section 73.3540 of the Commission's Rules. See KRLI, Malta Bend, Missouri, 14 FCC Rcd 17739 (MMB 1999). Mr. Eleazer's conduct in this regard has been both "willful" and "repeated" within the meaning of 47 U.S.C. § 503(b)(1)(B).⁴ The

³ Caroline K. Powley v. Melvin N. Eleazer, Va. State Circ. Ct. for the City of Danville (Chancery No. 95-1219).

⁴ The Commission has held that an act or omission is "willful" if it is a conscious and deliberate act or omission, whether or not there is any intent to violate the rule. See Southern California Broadcasting Company, 6 FCC Rcd 4387(1991), *recon. denied*, 7 FCC Rcd 3453 (1992). Furthermore, a continuing violation is "repeated" if it lasts more than one day. Id., 6 FCC Rcd at 4388.

guidelines set forth in the Commission's Forfeiture Policy Statement⁵ specify a base forfeiture amount of \$8,000 for an unauthorized transfer of control of the nature that occurred at station WDRL-TV. However, we believe that that amount is insufficient, given Mr. Eleazer's similar transgression at station W54BT. See note 2, supra. Accordingly, an upward adjustment of \$2,000 to the base monetary amount is warranted. In addition, Danville will be directed to remedy this violation.

6. Section 73.1015 of the Commission's Rules states, in pertinent part, that "[n]o applicant . . . shall . . . in any application, pleading, or report or any other written statement submitted to the Commission, make any misrepresentation or willful omission bearing on any matter within the jurisdiction of the Commission." Misrepresentation involves false statements of fact made with intent to deceive the Commission. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). Intent to deceive is a factual question that can be inferred if other evidence shows that a motive or logical desire to deceive exists. Black Television Workshop, 8 FCC Rcd 4192, 4198 n.41 (1993) (subsequent history omitted). However, the absence of any affirmative evidence of an intent to deceive forecloses the need for a license revocation hearing. In re Weigel Broadcasting Co., 2 FCC Rcd 1206 (1987). A willful material omission need not be accompanied by an intent to deceive. It is sufficient that the omission be conscious and deliberate, irrespective of intent. Abacus Broadcasting Corp., 8 FCC Rcd 5110, 5115 (Rev. Bd. 1993). For the reasons discussed below, we do not find that the licensee made misrepresentations to, lacked candor, or willfully omitted information from the Commission concerning any of the filings or submissions in question.⁶

7. *Forgery*. In an affidavit given August 5, 1998, in the bankruptcy proceeding, Ms. Powley, the putative 51% partner of Danville, declared that without her knowledge or consent, "Eleazer forged my name to documents filed at the [FCC]. . . ." Her testimony referred to the cover letter to and the WDRL-TV construction permit modification application, File No. BMPCT-930909KE, filed in September 1993. In her affidavit, Ms. Powley claims that she did not report this to the Commission at the time of the application's filing because she did not become aware of this forgery until the document "surfaced during litigation."

8. Mr. Eleazer states that he obtained Ms. Powley's consent telephonically and explains that he had no motive to misrepresent her approval of the filing of the application because, as partner, he was empowered to submit it under his own signature. We are persuaded by this explanation, and note that, even if Mr. Eleazer incorrectly believed Ms. Powley's signature was necessary, at the time of the application's filing, September 1993, the parties were not then adversarial, and it seems unlikely that she would have withheld consent that he sign on her behalf. In this regard, Mr. Eleazer provided contemporaneous telephone records verifying that he made

⁵ On October 14, 1997, the guidelines established by the Commission in its Report and Order, In re the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules, 12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999), became effective.

⁶ In this case, our finding that submissions made by Danville's principal, Mr. Eleazer, contained no misrepresentations also, by implication, exculpates Ms. Powley.

calls to Ms. Powley prior to the application's filing, consistent with his explanation that he obtained her consent (EEX 31; EEX 37). In response, Ms. Powley claims that she would not have consented to the filing, because the application contained alleged "inconsistencies." Powley contends that she later attempted to alert the Commission to these deficiencies through a purported July 29, 1994, letter to the Video Services Division. However, Ms. Powley has not provided a dated receipt copy of that letter or other documentation establishing that it was actually filed. In any event, although the recently-submitted copy of her purported July 29, 1994, letter (PA 79) refers to alleged "inconsistencies" contained in the application, Ms. Powley did not therein specify that Eleazer had forged her signature. In view of the foregoing, we do not believe that a serious question has been raised as to whether Danville made misrepresentations to the Commission concerning the filing of this application (EEX 36).

9. *Construction Progress.* Ms. Powley further alleges that Mr. Eleazer "averred falsely that the station's transmitter had been installed, that the station's antenna had been purchased and delivered and that the station's site had been rented" in connection with the January 11, 1994 filing of an extension of construction permit application (File No. BMPCT-940111KE).

10. Specifically, Ms. Powley argues that the application contains photographic evidence of a transmitter that did not represent the equipment installed at WDRL-TV, but instead belonged to a different station. On the other hand, Mr. Eleazer explains that the photographs depicted the transmitter equipment that was delivered to WDRL-TV's former location and was installed or being installed at the station's Pelham, North Carolina site, which was the subject of Danville's pending modification application. With respect to the transmitter itself, the photographs depicted the transmitter, which had earlier been supplied by Ms. Powley's father and delivered to the Pelham site and which Mr. Eleazer had installed and was in the process of modifying to operate at a higher power level of 10 kilowatts. Subsequently, the transmitter was deemed not operational by Mr. Eleazer and was removed from the Pelham site. Accordingly, we do not find that Mr. Eleazer, through the photographs submitted, attempted to mislead the Commission as to the progress made at that time in constructing WDRL-TV.

11. Similarly, it does not appear that Danville attempted to mislead the Commission with respect to its acquisition of the antenna for WDRL-TV and the leasing of the station's transmitter site. While Danville had, in fact, ordered the station's antenna and tendered the required downpayment in October, 1993, as reflected in the January, 1994 extension application, the controversy that subsequently arose with respect to whether the antenna had been "purchased" stemmed both from a sale commission misunderstanding between Mr. Eleazer and the equipment vendor that resulted in the downpayment check being returned to Mr. Eleazer on February 22, 1994 since the check was over 60 days old (EEX 39) and from Mr. Eleazer's apparent confusion in testifying as to whether that check was "ever negotiated" (EEX 31, pp 82-83). With respect to the leasing of the transmitter site, Danville included with the extension application a June 15, 1993 letter to Donna Pryor Echoles, the daughter of the site owner, describing the initial understanding Ms. Powley had reached with her regarding Danville's use of the site and its desire to begin leasing the site in October, 1993. Also submitted was a check signed by Mr. Eleazer and made payable to Ms. Echoles for two monthly payments. While Mr. Eleazer's statements concerning the tendering of this check to Ms. Echoles were conflictive, it is not disputed that Danville was using the Pelham site at the time the extension application was

filed. Further, monthly payments on behalf of the permittee were made from September 1993 through February 1994, after which time a formal lease agreement was executed with the site's owner. Under these circumstances, we do not view the letter and check as an attempt to mislead the Commission.⁷

12. *License Application and Current Technical Operation.* Citing an August 2, 1998, report (PA 85) and later bankruptcy testimony given by consulting engineer Melvyn Lieberman (EEX 41), Ms. Powley further alleges that Mr. Eleazer, in connection with the station's license application, File No. BLCT-940818KF, "averred falsely that all terms, conditions and obligations" set forth in the underlying construction permit were met. According to Ms. Powley, the station was not operating in compliance with its authorizations. Specifically, she alleges that Mr. Eleazer falsely indicated that the station's antenna then in use was an "Antenna Concepts ACS-32-SP-24"; that the effective radiated power of the station was 1142.6 kilowatts; and that the antenna height was 61meters.

13. In response to Ms. Powley's allegations, Mr. Eleazer submits an engineering analysis prepared by Scott Jordan during September 5-6, 1998 (EEX 30) that, unlike the Lieberman report, was based on an on-site inspection with full access to the station's facilities. Mr. Jordan's report found the station to be operating in substantial compliance with its license and underlying permit, with the equipment specified in those authorizations. In crediting Jordan's report, which was based on an extensive and lengthy on-site examination utilizing appropriate electronic diagnostic equipment, we note that the Lieberman report was, in contrast, based on an inspection of the station and its antenna from the outside alone, during a 45 minute period, and on photographs (EEX 41, November 17, 1998 bankruptcy testimony, pp. 27-40). Furthermore, unlike Mr. Jordan, Mr. Lieberman calculated the station's ERP through estimation, and without the benefit of field-strength observation or other metered readings (EEX 41, November 17, 1998 bankruptcy testimony, pp. 29-30). Accordingly, we find that Ms. Powley's allegations on this issue have been adequately rebutted. Thus, we do not find a question as to whether Danville made misrepresentations to the Commission concerning the filing of this application.

14. *Request for Reduction of Forfeiture.* Powley also alleges that Mr. Eleazer gave false information to the Commission concerning Danville's financial condition when the licensee sought reduction of a January 1997 \$10,000 Notice of Apparent Liability for its apparent violations concerning over-commercialization during children's programming. Powley bases this claim on the fact that the financial information provided by Mr. Eleazer is inconsistent with the financial information he provided in an earlier request for a bank loan. Mr. Eleazer responds that the veracity of the licensee's February 1997 reduction request is not compromised because Danville, in seeking a 1994 bank loan (PA 88), ascribed higher estimates to the station's then-current and potential future worth. We agree. A misrepresentation issue is not presented by the

⁷ Mr. Eleazer acknowledges signing Ms. Powley's name on the June 15th letter. He explains that he did so since Ms. Powley had originally dealt with the site owner and that he had Ms. Powley's permission to sign her name. While Ms. Powley disputes giving her permission, we again note that Mr. Eleazer, as a Danville general partner, was empowered to deal with the site's owner on the permittee's behalf and that it seems unlikely that Ms. Powley would have withheld her consent for Mr. Eleazer signing on her behalf.

mere fact that three-year-old financial estimates have changed.

15. *Broadcast Station Employment Report.* Ms. Powley alleges that the licensee's April 26, 1997 Form 395B "Broadcast Station Employment Report" contained false information concerning the number of people employed at the station during the period May 31, 1996 through May 31, 1997. In this regard, she alleges that the licensee indicated falsely that the station had five employees during this period when, in fact, it had none. In response, Eleazer explains that he mistakenly reported the employees in question as those of Danville when they were, in fact, employees of BIP/Channel 24 Productions, the LMA operator controlled by Pridemore, because he was their immediate supervisor and there was no provision or question in the form as to whether the station employees were employees of the licensee or the LMA operator. Although Eleazer incorrectly interpreted the information requested in the broadcast station employment report, his error appears to be more indicative of an honest mistake than an intent to deceive, particularly since he prepared the report without the assistance of counsel. Notwithstanding this finding, we admonish Danville for its clear violation of the Commission's main studio staffing requirements. See Jones Eastern of the Outer Banks, Inc., 6 FCC Rcd 3615 (1991), clarified, 7 FCC Rcd 6800 (1992). The information before us reflects that the only people staffing the WDRL-TV studio, including Mr. Eleazer, are employees of BIP/Channel 24 Productions. While we believe that an admonishment is the appropriate sanction for this violation, Danville will also be directed to remedy this violation. See KRLI, Malta Bend, Missouri, *supra*.

16. *Notification of Return to Operation.* Ms. Powley alleges that Mr. Eleazer's August 28, 1997 notification to the Commission (EEX 43) that the station had returned to the air following a lightning strike contained the false assertion that it was then "operating within the parameters specified within its authorization." Her claim that the notification was false is based upon an August 2, 1998 engineering report prepared by her consulting engineer, Melvyn Lieberman. Ms. Powley apparently assumes on the basis of the 1998 report that the station has never operated pursuant to its authorization and, therefore, the 1997 notification to the Commission was false. However, Mr. Lieberman's July 21, 1998 inspection of the station and subsequent report have little probative value regarding the station's operational status when the 1997 notification was filed, which was almost a year earlier. Moreover, as we have previously discussed, the information provided by Mr. Eleazer's consulting engineer, Scott Jordan has adequately rebutted this allegation (EEX 30, Jordan Report). Furthermore, Eleazer provides copies of the station's engineering logs demonstrating, as a contemporaneous document, that the station was operating at full authorized power on the notification date (EEX 44).⁸ We, therefore, do not find that Danville made misrepresentations to the Commission concerning this submission.

17. *Main Studio Location.* Powley further claims that WDRL-TV's main studio was moved to a site in Pelham, North Carolina, which she claims is outside of the station's principal community contour, without Commission authorization as required by Section 73.1125. However, Ms. Powley provided no contour map evidence to support her charge. Furthermore, our engineering staff has determined from a study of contour maps that the Pelham, North

⁸ Mr. Eleazer also provided copies of invoices and cancelled checks, as well as a copy of a confirmation of funds paid, for replacement parts for the equipment that had been damaged by the lightning strike (EEX 44).

Carolina site is within the principal community contour of WDRL-TV.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission's Rules, Danville Television Partnership is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of ten thousand dollars (\$10,000.00) for willfully and repeatedly violating Section 310(d) of the Communications Act and Section 73.3540 of the Commission's Rules.

19. IT IS FURTHER ORDERED, That, pursuant to Section 1.80 of the Commission's Rules, within thirty days of the release date of this Notice, Danville Television Partnership SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, and addressed to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL number of this proceeding (NAL No. 118420006). 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.

20. IT IS FURTHER ORDERED, That a copy of this Notice of Apparent Liability for a Forfeiture SHALL BE SENT by Certified Mail – Return Receipt Requested, to Danville Television Partnership's counsel of record: Denise B. Moline, Esq., 1212 So. Naper Blvd., Suite 119, Naperville, Illinois 60540.

21. IT IS FURTHER ORDERED, That, within 30 days of the release date of this Order, Danville Television Partnership IS DIRECTED to file with the Secretary of the Commission, attention Mass Media Bureau, a plan of action for coming into compliance with Section 310(d) of the Communications Act and Sections 73.3540 and 73.1125 of the Commission's Rules. Such plan shall set forth the steps the licensee proposes to take or has already taken to reacquire control of station WDRL-TV consistent with the Commission's rules and policies and to staff station WDRL-TV with its own employees.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau