

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

In the Matter of)
)
)
Citicasters Co.) File No. 00-IH-0283
) NAL/Acct. No. 200132080019/MG
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 12, 2001

Released: February 13, 2001

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Citicasters Co. (Citicasters) apparently willfully and repeatedly violated Section 310(d) of the Communications Act, as amended (the Act)¹, and Section 73.3540 of the Commission’s rules² by assuming control of WBTJ(FM), Hubbard, Ohio, without prior Commission consent. Based upon the facts and circumstances surrounding these apparent violations, we find that Citicasters is apparently liable for a forfeiture in the amount of \$25,000.

II. BACKGROUND

2. Citicasters is an indirect subsidiary of Clear Channel Communications, Inc., which controls radio station licenses in and around the Youngstown, Ohio area.³ Stop 26–Riverbend, Inc. (Stop 26), is the licensee of WBTJ(FM), also in the Youngstown area. Citicasters and Stop 26 entered into an asset purchase agreement and a related time brokerage agreement (TBA)⁴ in connection with an application proposing the assignment of WBTJ(FM)’s license from Stop 26 to Citicasters. See File No. BALH-19990816GE. The TBA referenced the asset purchase agreement for the proposed sale of the station, and

¹ 47 U.S.C. § 310(d).

² 47 C.F.R. § 73.3540.

³ Radio station licenses controlled by Clear Channel Communications, Inc. include WKBN(AM) and WMXY(FM), Youngstown, Ohio. Citicasters Co. is the licensee of both of these stations.

⁴ Time brokerage is defined as “a type of joint venture that generally involves the sale by a licensee of ‘discrete blocks of time to a “broker” who then supplies the programming to fill that time and sells the commercial spot announcements to support it.’” *Revision of Radio Rules and Policies* in MM Docket 91-140, *Report and Order*, 7 FCC Rcd 2755, 2784 (1992), *citing Policy Statement* in BC Docket No. 78-355, 82 FCC 2d 107 n.2 (1980). Time brokerage agreements also may be referred to as “local marketing agreements” in practice and in the Commission’s precedents.

provided that Stop 26 would accept programming from Citicasters for broadcast on WBTJ(FM). While the assignment application was pending, Stop 26 and Citicasters became involved in a dispute after Stop 26 gave Citicasters notice that it would terminate the TBA in order to provide programming on WBTJ(FM) of its own choosing. Citicasters rejected this notice of termination because Stop 26 had not repaid advances made to it under the asset purchase agreement. Stop 26 and Citicasters attempted to resolve issues related to the TBA and financial arrangements under the asset purchase agreement, but could not reach a settlement. Citicasters then filed a complaint in state court based on the dispute. Citicasters also requested a restraining order and injunction to prevent Stop 26 from “interfering, obstructing, or disrupting programming broadcast by Citicasters on the station.” *Complaint* filed by Citicasters on June 20, 2000, Court of Common Pleas, Mahoning County, OH.

3. The state court in Mahoning County, Ohio, issued a temporary restraining order that required Stop 26 to seek court approval before placing programming on WBTJ(FM). Specifically, the restraining order provided that Stop 26 may preempt Citicasters’ programming on WBTJ(FM) “only after issuance of an order from [the state court] that such preemption is necessary and permitted under the TBA.” *Citicasters Co. v. Stop 26-Riverbend, Inc.*, No. 00-CV-1582 (Mahoning County Court of Common Pleas, July 21, 2000)(Order Reaffirming and Continuing Temporary Restraining Order entered June 20, 2000). The court’s order restrained Stop 26 “from in any manner, either directly or indirectly, interfering, obstructing, or disrupting Plaintiff [Citicasters Co.] in broadcasting programming on WBTJ, 101.9 FM or taking any actions in violation of Plaintiff’s rights under its Time Brokerage Agreement...” *Id.* Stop 26 had resumed programming WBTJ(FM) on July 1, 2000 while it pursued appeals of the Mahoning County court’s orders. However, those appeals were ultimately unsuccessful.⁵ On August 22, 2000, Stop 26 permitted Citicasters to resume programming WBTJ(FM), in compliance with the court’s July 21, 2000 temporary restraining order.⁶ However, Stop 26 requested and obtained the Commission’s dismissal of the assignment application, over Citicasters’ objection.⁷

4. Stop 26 also filed a formal complaint with the Commission based on Citicasters’ actions with respect to WBTJ(FM). The complaint referenced the court orders that required Stop 26 to obtain court approval before preempting programming that Citicasters provides to WBTJ(FM) under the TBA. The staff of the Enforcement Bureau, Investigations and Hearings Division, reviewed this complaint, and determined that Citicasters may have effectively exercised control over the programming of WBTJ(FM), in violation of Section 310(d) of the Act, which prohibits the transfer of control of a broadcast station license, or any rights thereunder, without prior Commission consent. The Investigations and Hearings Division

⁵ Orders of the Mahoning County court were stayed pending procedural appeals. The temporary restraining order was reinstated following the conclusion of those appellate proceedings and the case was remanded to the Mahoning County court.

⁶ Stop 26’s initial refusal to comply with the court’s temporary restraining orders resulted in a contempt citation being issued to Stop 26 and Percy Squire, an officer and shareholder, and its counsel. *Citicasters Co. v. Stop 26-Riverbend, Inc.*, No. 00-CV-1582 (Mahoning County Court of Common Pleas, Sept. 21, 2000)(*Judgment Entry*).

⁷ Stop 26 filed a request for voluntary dismissal of the assignment application on July 11, 2000. Citicasters filed an opposition, requesting that the Commission maintain the *status quo* pending the outcome of the ongoing litigation. However, the staff of the Mass Media Bureau subsequently dismissed the assignment application. *Letter to Percy Squire, Esq.*, Reference No. 1800B3-AB (Chief, Audio Services Division, MMB, Sept. 7, 2000). Citicasters has filed a petition for reconsideration of the staff’s action dismissing the assignment application.

issued a letter of inquiry directing Citicasters to explain its actions in light of Section 310(d) of the Act and the Commission's rules and policies concerning control of a broadcast station license. *See* Letter to Mr. Jerome L. Kersting, Senior Vice President, Citicasters Co., Ref. EB-00-IH-0283/MG, from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau (Oct. 18, 2000).

5. Citicasters filed its response to the Enforcement Bureau's letter of inquiry, and asserted that its actions did not effectuate an unauthorized transfer of control of WBTJ(FM). Citicasters argues that the terms of the TBA are consistent with Commission precedent, ensuring that Stop 26 remained in control of WBTJ(FM) but requiring Stop 26 to make decisions concerning programming and station operations in a reasonable, good faith manner. Citicasters claims that Stop 26 failed to act reasonably or in good faith with respect to its attempts to terminate the TBA and to preempt programming, thereby breaching the terms of its contractual agreements. Citicasters argues that under these circumstances, it was entitled to seek judicial enforcement of the terms of the TBA. In addition, Citicasters asserts that the temporary restraining order preserved the *status quo* pending the outcome of litigation of the parties' contractual disputes, especially given: (1) Stop 26's unjustifiable attempt to terminate the TBA in the context of its breach of the purchase agreement; (2) Stop 26's attempts to use preemption of Citicasters' programming as a pretext to avoid its contractual obligations under the asset purchase agreement and TBA and (3) the irreparable harm to Citicasters, to WBTJ(FM)'s advertisers, and to WBTJ(FM)'s listeners caused by Stop 26's unilateral termination of Citicasters' programming. Furthermore, Citicasters asserts that the Commission does not have jurisdiction to adjudicate this contractual dispute. Citicasters claims that the Ohio court was required to enforce the TBA and determine whether Stop 26 abided by its obligations to preempt programming in a reasonable, good faith manner. Citicasters argues that the temporary restraining order was merely a safeguard and a screening device to ensure that Stop 26 complied with the terms of the TBA and did not interfere with its *bona fide* contract rights during the pendency of litigation within the exclusive jurisdiction of the state court.

6. The letter of inquiry issued by the Investigations and Hearings Division also afforded Stop 26 the opportunity to respond to Citicasters' submission. Stop 26 asserts that Citicasters usurped its authority by precipitating and vigorously prosecuting injunctive relief that has barred Stop 26 from programming WBTJ(FM). In this regard, Stop 26 claims that Citicasters deliberately thwarted its repeated attempts to resume programming the station by pursuing the temporary restraining order as well as criminal contempt citations against Stop 26 and its principals which were imposed after Stop 26 failed to immediately comply with the court's orders. Stop 26 also filed a supplement which indicates that Stop 26 resumed programming WBTJ(FM) on November 12, 2000.⁸ In addition, Stop 26 reported that on November 17, 2000, it received written notification of Citicasters' intention to terminate the TBA. Citicasters responded to Stop 26's supplement, and reiterated its argument that it was entitled to seek injunctive relief in state court and that there has been no unauthorized transfer of control of WBTJ(FM) as a consequence of its conduct. Citicasters also affirms that the TBA has been terminated.⁹

⁸ Stop 26's supplemental pleading indicates that, in its view, the temporary restraining order had expired due to the passage of time.

⁹ We note that on October 10, 2000, Stop 26 filed a third party complaint in the state court proceeding, naming the Commission's Chairman and the individual Commissioners in this complaint. The case was removed to federal court pursuant to 28 U.S.C. § 1442(a)(1), which provides for the removal of cases involving claims against federal officers. However, the federal court has dismissed the third party complaint, has terminated the temporary restraining order, and has remanded the case to the Mahoning County Court of Common Pleas for further proceedings. *Citicasters Co. v. Stop 26-Riverbend, Inc.*, Case No. 4:00CV02808 (N.D. O.H. Feb. 5, 2001). Stop 26 has appealed the dismissal and remand.

III. DISCUSSION

7. Section 310(d) of the Communications Act, as amended, prohibits the transfer of control of a broadcast station license, or any rights thereunder, without prior Commission consent. 47 U.S.C. § 310(d). *See also* 47 C.F.R. § 73.3540. The Commission has ruled that a licensee's participation in a local marketing or time brokerage agreement is not *per se* a violation of the Communications Act or any Commission rule or policy. *WGPR, Inc.*, 10 FCC Rcd 8140, 8141 (1995)(subsequent history with respect to unrelated issues is omitted).

8. However, the Commission has repeatedly emphasized that a licensee involved in a time brokerage agreement must retain ultimate control of the station. *See, e.g., Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534 (1997); *WGPR, Inc., supra*; *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). "The focus of any Commission inquiry with respect to the locus of control of a station's operation is tripartite: the programming, the personnel and the finances." *WGPR, Inc.*, 10 FCC Rcd at 8141. Licensees are permitted under Section 310(d) of the Act to delegate day-to-day operations, but such delegation may not be wholesale. The licensee, and not the broker, must mandate the basic policies pertaining to fundamental station operations in these three areas. *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981); *The Alabama Educational Television Commission*, 33 FCC 2d 495, 508 (1972). The Commission evaluates issues of license control by ascertaining whether the licensee establishes policies governing these three essential areas of station operation. *See WGPR, Inc.*, 10 FCC Rcd at 8142.

9. Citicasters claims that terms of the TBA are in accord with the terms of other similar agreements approved by the Commission. Specifically, with regard to preemption rights, Citicasters cites similar agreements that contain provisions requiring the licensee's programming substitution decisions to be made "in good faith." *WGPR, Inc.*, 10 FCC Rcd at 8141; *Roy R. Russo*, 5 FCC Rcd 7586 (MMB 1990). Citicasters states that each of these agreements require the licensee's control to be "reasonably exercised" with respect to decisions concerning programming, station policies and operations. Citicasters also argues that provisions for termination of the TBA are comparable to those approved in *WGPR, Inc.*¹⁰ Moreover, Citicasters claims that the terms of the TBA and asset purchase agreement were reviewed and approved by the Commission in connection with an earlier sale of WBTJ(FM) from Stop 26 to Citicasters that ultimately could not be consummated.¹¹

10. However, the Commission looks beyond the terms of the agreement to the facts of a specific case in order to determine the exercise of actual control. Thus, Citicasters cannot avoid scrutiny by claiming that the terms of its TBA with Stop 26 were modeled on other agreements, including the

¹⁰ Under the TBA, the termination was to occur upon closing of the purchase agreement or within 10 days of termination of the purchase agreement. In addition, the TBA could be terminated by the non-defaulting party in the event of a default by the other party.

¹¹ The approval of the application to assign the license of WBTJ(FM) from Stop 26 to Citicasters predated the merger of Citicasters' parent company, Jacor Communications, Inc., and Clear Channel Communications, Inc. *See* File No. BALH-19980528GE. Control of Jacor, and its indirect subsidiary, Citicasters, was transferred to Clear Channel upon consummation of the merger, but Clear Channel was not the assignee approved in the May 1998 assignment application. Accordingly, following the merger, a new application was filed for consent to assign the license of WBTJ(FM) from Stop 26 to Citicasters. *See* File No. BALH-19998016GE. As discussed *infra*, this application was later dismissed at Stop 26's request.

agreement at issue in *WGPR, Inc.* The Commission's decision in *WGPR, Inc.* recites the terms of a local marketing agreement, including the licensee's obligation to make "good faith" determinations as to whether to preempt programming. In addition, the Commission ruled that "the licensee should be ready and able to operate independently from the broker at any time it believes the arrangement does not fulfill its public interest responsibilities." 10 FCC Rcd at 8145. In *WGPR, Inc.*, Commission concluded the local marketing agreement, including the "good faith" provisions:

assures that [the licensee] has the unqualified right to: substitute a program it believes is of greater local or national importance or which it believes will better address the problems, needs and interests of [WGPR-TV's community of license]; reject or refuse a program that it believes is unsuitable or contrary to the public interest; refuse to broadcast any program that does not meet Commission requirements; preempt any program in the event of a local, state or national emergency; and delete any commercial announcement that does not comply with Commission requirements or any other laws.

8 FCC Rcd at 8142.

Moreover, the Commission determined that the licensee "has maintained control of WGPR-TV programming as provided under the terms of its local marketing agreement and *in practice.*" *Id* at 8143 (emphasis added).

11. In determining whether or not the licensee has control over station programming, the Commission has looked at, among other things, the licensee's involvement in any format changes and the ability of the licensee to reject or preempt programming. *Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534, 8538-39 (1997); *WGPR, Inc.*, 10 FCC Rcd at 8142. During the period from August 22, 2000 to November 12, 2000, the injunctive relief awarded to Citicasters at its request required Stop 26 to seek court approval before exercising involvement in WBTJ(FM)'s programming. Whether or not this was consistent with the contract, it is inconsistent with the licensee's primary obligations with respect to an essential aspect of station operation. The Commission's policies and decisions regarding the permissibility of time brokerage agreements have emphasized that the licensee is responsible for the programming aired on its station, regardless of the source, and that licensees of brokered stations are not exempt from their responsibility to assess community needs and problems and to provide issue responsive programming.¹²

12. While we do not disagree with Citicasters' assertion that its agreements with Stop 26 encompass certain contractual rights and obligations that are outside the Commission's regulatory jurisdiction, we are not adjudicating such rights and obligations here. Rather, we are assessing whether Citicasters violated the Communications Act and the Commission's rules by obtaining interim equitable relief from a state court – in the form of temporary restraining orders that effectively substituted a non-licensee's programming policies and decisions for those of Stop 26 – without prior approval of the Commission. We believe that Citicasters' actions precluded Stop 26 from exercising its rights to substitute programming which "it believes is of greater local or national importance or which it believes will better

¹² See, e.g., *Revision of Radio Rules and Policies* in MM Docket 91-140, *Memorandum Opinion and Order*, 7 FCC Rcd 6387, 6401-02 (1992)(subsequent history omitted)(imposing restrictions under the local radio ownership rules on certain time brokerage agreements and requiring licensee's/permittee's certification that it maintains control over the station's facilities, including finances, personnel and programming). See also *Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208, 2214 (1989)(Under Commission's former cross-interest policy, time brokerage agreements were permitted, subject to requirement that licensee maintain control over its programming); *Part-time Programming*, 82 FCC 2d 107 (1980).

address the problems, needs and interests” of the community of license. *See WGPR, Inc.*, 8 FCC Rcd at 8142. It was not sufficient that Stop 26 had the right to seek court approval to preempt programming under the TBA. Where a contractual dispute is before a court, the licensee must retain actual control of essential station functions unless the Commission gives prior consent to the assignment or transfer of control of the station. Thus, it is a violation of the Communications Act to invoke remedies for breach, including injunctive or other equitable relief, that impinge on such control, without obtaining prior Commission consent. Under these circumstances, Citicasters’ actions appear to have resulted in a violation of Section 310(d) and Section 73.3540 of the rules. In this regard, control over any one of the three areas essential to station operation is sufficient for a finding of an unauthorized transfer or an unauthorized assumption of control. *See, e.g., Hicks Broadcasting of Indiana, LLC*, 13 FCC Rcd 10662, 10677 (1998)(Hearing Designation Order). Until Stop 26’s ability to preempt programming on WBTJ(FM) was restored, it could not exercise control over its license.

IV. CONCLUSION AND FORFEITURE AMOUNT

13. We conclude that Citicasters apparently violated Section 310(d) the Act and Section 73.3540 of the Commission’s rules by assuming control of WBTJ(FM), Hubbard, Ohio, without prior Commission consent. The violation continued from August 22, 2000, when Stop 26 came into compliance with the temporary restraining order issued by the state court, until November 12, 2000, when Stop 26 resumed programming of WBTJ(FM). Based upon our review of the entire record, we find that the violations were willful and repeated. 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. *Southern California Broadcasting Company*, 6 FCC Rcd 4387 (1991)(definition of willfulness contained in 47 U.S.C. § 312(f) applies equally to 47 U.S.C. § 503). Furthermore, a continuing violation is “repeated” if it lasts more than one day. *Id.*, 6 FCC Rcd at 4388. Under these circumstances, we conclude that the violations warrant the imposition of a monetary forfeiture.

14. Section 503(b)(2)(D) of the Act¹³ and Section 1.80(b)(4) of the Commission’s rules¹⁴ require us to take into account “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.”¹⁵ The Commission’s *Forfeiture Guidelines* establish a base 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 Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999)(Policy Statement). We find that imposition of a forfeiture that is higher than the base amount is warranted based on our review of the record. In this regard, Citicasters’ actions were particularly serious in light of Stop 26’s repeated and consistent attempts to resume programming WBTJ(FM). Further, the record supports a finding that Citicasters is an experienced broadcaster which should have been aware that its actions with respect to WBTJ(FM) required prior Commission approval. Thus, based upon the information before us and taking into consideration the factors expressed in Section 503(b)(2)(D) of the Act, we find that a forfeiture in the amount of twenty-five thousand dollars (\$25,000) is appropriate.

V. ORDERING CLAUSES

¹³ 47 U.S.C. § 503(b)(2)(D).

¹⁴ 47 C.F.R. § 1.80(b)(4).

¹⁵ 47 U.S.C. § 503(b)(2)(D).

15. ACCORDINGLY, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended,¹⁶ and Section 1.80 of the Commission's rules,¹⁷ Citicasters Co. is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of twenty-five thousand dollars (\$25,000) for willfully and repeatedly violating Section 310(d) of the Communications Act of 1934,¹⁸ as amended, and Section 73.3540 of the Commission's rules.¹⁹

16. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules,²⁰ that within thirty days of the release of this Notice, Citicasters Co., 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. 200132080019). 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. 20554.²¹

17. IT IS FURTHER ORDERED, that a copy of this Notice of Apparent Liability for forfeiture SHALL BE SENT by Certified Mail – Return Receipt Requested, to Citicasters' counsel of record: Marissa G. Repp, Esq., Hogan & Hartson, L.L.P., 555 13th Street, N.W., Washington, DC 20004-1109

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁶ 47 U.S.C. § 503(b).

¹⁷ 47 C.F.R. § 1.80.

¹⁸ 47 U.S.C. § 310(d).

¹⁹ 47 C.F.R. § 73.3540.

²⁰ 47 C.F.R. § 1.80.

²¹ *See* 47 C.F.R. § 1.1914.