

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

| | | |
|---|---|--------------------------|
| In the Matter of |) | EB-10-IH-2083 |
| |) | |
| LONG ISLAND UNIVERSITY PUBLIC |) | FRN No. 0015679806 |
| RADIO NETWORK |) | Account No. 201132080014 |
| |) | |
| Licensee of Noncommercial Educational Station |) | Facility ID No. 38340 |
| WLIU(FM), Southampton, NY |) | |

ORDER

Adopted: October 1, 2010**Released: October 1, 2010**

By the Chief, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into by the Enforcement Bureau ("Bureau") and Long Island University Public Radio Network, licensee of Station WLIU(FM), Southampton, New York ("Licensee"). The Consent Decree terminates the Bureau's investigation into whether the Licensee and Peconic Public Broadcasting ("Peconic") violated Section 310 of the Communications Act of 1934, as amended,¹ and Section 73.3540 of the Commission's Rules,² by engaging in conduct that exceeded the scope of a management agreement between the Licensee and Peconic, thereby effectuating a possible *de facto* unauthorized transfer of control.

2. The Bureau and the Licensee have negotiated the terms of the Consent Decree that resolves this matter. A copy of the Consent Decree is attached hereto and incorporated by reference.

3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree and terminating the investigation.

4. In the absence of material new evidence relating to this matter, we conclude that our investigation raises no substantial or material questions of fact as to whether the Licensee possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.

5. Accordingly, **IT IS ORDERED** that, pursuant to Section 4(i) of the Communications Act of 1934, as amended,³ and Sections 0.111 and 0.311 of the Commission's Rules,⁴ the Consent Decree attached to this Order **IS ADOPTED**.

6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED**.

¹ See 47 U.S.C. § 310.

² See 47 C.F.R. § 73.3540.

³ See 47 U.S.C. § 154(i).

⁴ See 47 C.F.R. §§ 0.111, 0.311.

7. **IT IS FURTHER ORDERED** that the third-party complaint pending before the Enforcement Bureau against the Licensee related to the above-captioned investigation as of the date of this Consent Decree **IS DISMISSED**.

8. **IT IS FURTHER ORDERED** that a copy of this Order and the Consent Decree shall be sent by first-class, certified mail, return receipt requested to Long Island University Public Radio Network, c/o John Crigler, Esq., Garvey Schubert Barer, Fifth Floor, 1000 Potomac Street N.W., Washington, D.C., 20007.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

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

In the Matter of

**LONG ISLAND UNIVERSITY PUBLIC RADIO
NETWORK**Licensee of Noncommercial Educational Station
WLIU(FM), Southampton, New York

)
) File No. EB-10-IH-2083
)
) FRN No. 0015679806
) Acct. No. 201132080014
)
) Facility ID No. 38340
)

CONSENT DECREE

1. The Enforcement Bureau (“Bureau”) and Long Island University Public Radio Network (“Licensee”), by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Bureau’s investigation into whether the Licensee violated Section 310(d) of the Communications Act of 1934, as amended,⁵ and Section 73.3540 of the Commission’s rules.⁶

I. DEFINITIONS

2. For the purposes of this Consent Decree, the following definitions shall apply:

- (a) “Act” means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
- (b) “Adopting Order” means an Order of the Commission adopting the terms of this Consent Decree without change, addition, deletion, or modification.
- (c) “Agreement” means the management agreement entered into between Long Island University Public Radio Network and Peconic Public Broadcasting on December 1, 2009.
- (d) “Bureau” means the Enforcement Bureau of the Federal Communications Commission.
- (e) “Commission” and “FCC” mean the Federal Communications Commission and all of its bureaus and offices.
- (f) “Complaint” means the third-party complaint received by the Commission on February 20, 2010, alleging that Long Island University Public Radio Network and Peconic Public Broadcasting engaged in an unauthorized transfer of control.
- (g) “Compliance Plan” means the program described in this Consent Decree at paragraph 9.
- (h) “Effective Date” means the date on which the Bureau releases the Adopting Order.

⁵ See 47 U.S.C. § 310(d).

⁶ See 47 C.F.R. § 73.3540.

- (i) “Investigation” means the Bureau’s investigation of the Complaint alleging, among other things, that LIU and Peconic violated Section 310 of the Act and Section 73.3540 of the Rules.⁷
- (j) “Investigations and Hearings Division” means the Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, acting on behalf of the Enforcement Bureau.
- (k) “Licensee” or “LIU” mean Long Island University Public Radio Network, licensee of noncommercial educational Station WLIU(FM).
- (l) “Parties” means Long Island University Public Radio Network and the Bureau.
- (m) “Peconic” means Peconic Public Broadcasting.
- (n) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.
- (o) “Station” means noncommercial educational Station WLIU(FM), Southampton, New York (Facility ID No. 38340).

II. BACKGROUND

3. Section 310(d) of the Act and Section 73.3540 of the Rules prohibit the transfer of control of a broadcast station without prior Commission consent.⁸ A licensee may, however, delegate day-to-day functions to an agent pursuant to a time brokerage agreement or to a local marketing or management agreement without engaging in an unauthorized transfer of control.⁹ Such delegation must be limited, however, to ensure that the licensee retains ultimate control of basic station policies.¹⁰ The touchstone of control “is not divining who executes the station’s programming, personnel and finance responsibilities,” but rather who establishes policies governing these three areas and exercises ultimate control.¹¹ To ensure the appropriate level of control, licensees engaged in a time broker or in a local marketing or management agreement “should be ready and able to operate independently from the broker at anytime it believes the arrangement does not fulfill its public interest responsibilities.”¹²

⁷ See Letter from Kenneth M. Scheibel, Jr., Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Long Island University Public Radio Network, dated April 29, 2010 (“LIU LOI”); see also Letter from Kenneth M. Scheibel, Jr., Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Wallace A. Smith, General Manager, Peconic Public Broadcasting, dated April 29, 2010 (“Peconic LOI”).

⁸ See 47 U.S.C. § 310(d); 47 C.F.R. § 73.3540(a).

⁹ See *Salem Broadcasting, Inc.*, Notice of Apparent Liability for Forfeiture, 6 FCC Rcd 4172 (Mass Media Bur. 1991). See also *WGPR, Inc.*, Memorandum Opinion & Order, 10 FCC Rcd 8140, 8142 (1995), *vacated on other grounds, sub nom. Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998).

¹⁰ See *WGPR, Inc.*, 10 FCC Rcd at 8142.

¹¹ *Id.*

¹² *Id.* at 8145. See *Salem Broadcasting, Inc.*, 6 FCC Rcd at 4173; *Bee Broadcasting Associates*, Hearing Designation Order and Notice of Apparent Liability, 5 FCC Rcd 6584 (1990). See generally *WLOX Broadcasting Company*, 260 F.2d 712, 715-16 (D.C. Cir. 1958); *Phoenix Broadcasting Co.*, 44 FCC 2d 838 (1973).

4. The Bureau received a Complaint alleging that Peconic (a not-for-profit corporation established for the purpose of acquiring WLIU(FM), and which had entered into an Agreement with LIU)¹³ had assumed control of the Station without first obtaining Commission approval. The Bureau began an investigation and issued letters of inquiry to the Licensee and Peconic.¹⁴ The Licensee and Peconic timely responded to the respective LOIs, each denying that it had engaged in an unauthorized transfer of control.¹⁵ The Bureau and the Licensee acknowledge that any proceedings that might result from the Investigation and/or the Complaint would be time-consuming and require substantial expenditure of public and private resources. In order to conserve such resources and to ensure continued compliance by the Licensee with the Act and the Commission's Rules, the Bureau and the Licensee are entering into this Consent Decree in consideration of the mutual commitments made herein. The terms of the Consent Decree reflect consideration of the Licensee's current financial condition and of the short duration of the alleged violation, among other factors.

III. TERMS OF AGREEMENT

5. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order without change, addition, modification, or deletion.

6. **Jurisdiction.** LIU agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree, and that it has the authority to enter into and adopt this Consent Decree.

7. **Effective Date; Violation.** The Parties agree that this Consent Decree shall become effective on the date on which the FCC releases the Adopting Order. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other Order of the Bureau. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Bureau Order, entitling the Bureau to exercise any rights and remedies attendant to the enforcement of a Commission Order.

8. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate its Investigation and dismiss the Complaint with prejudice. In consideration for the termination of said Investigation and dismissal of the Complaint, LIU agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that, in the absence of new material evidence, the Bureau will not use the facts developed in this Investigation through the Effective Date, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against LIU concerning the matters that were the subject of the Investigation. The Bureau also agrees that it will not use the facts developed in this Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against LIU with respect to its basic qualifications, including its character qualifications, to be a Commission licensee or to hold Commission authorizations.

¹³ See Letter from Ernest T. Sanchez, Esq., counsel for Peconic Public Broadcasting, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated June 7, 2010 ("Peconic LOI Response").

¹⁴ See *supra* note 3.

¹⁵ See Letter from Robert N. Altholz, Vice President for Finance, Long Island University Public Radio Network, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated June 7, 2010; Peconic LOI Response, *supra* note 9.

9. **Compliance Plan.** For purposes of settling the matters set forth herein, LIU agrees to maintain a Compliance Plan related to its future compliance with Section 310(d) of the Act, Section 73.3540 of the Commission's Rules, and the Commission's Orders related thereto. Such Compliance Plan will include, at a minimum, the following components:

- a. An officer of LIU ("Compliance Officer") will conduct a compliance examination of the Licensee's subsidiaries, companies, or affiliates that have negotiated local marketing or time brokerage/management agreements. Such examination will be conducted, at a minimum, every six months, beginning on the Effective Date.
- b. The Compliance Officer shall also consult with telecommunications counsel regarding the Licensee's overall compliance with Section 310(d) of the Act and Section 73.3540 of the Commission's rules on an annual basis, if not more frequently.
- c. The requirements of the Compliance Plan will expire three years from the Effective Date or upon LIU's complete assignment of all Commission licenses, whichever is earlier.

10. **Compliance Reports.** The Licensee will file compliance reports with the Commission 12 months, 24 months, and 36 months following the Effective Date. Each compliance report shall include a compliance certificate from the Compliance Officer, as an agent of and on behalf of LIU, stating that he/she has personal knowledge that LIU (i) has established operating procedures intended to ensure compliance with the terms and conditions of this Consent Decree and with Section 310 of the Act and Section 73.3540 of the Commission's Rules, together with an accompanying statement explaining the basis for the certification; (ii) has been utilizing those procedures since the previous Compliance Report was submitted; and (iii) is not aware of any instances of non-compliance. The certification must comply with Section 1.16 of the Rules and be subscribed to as true under penalty of perjury in substantially the form set forth therein. If the Compliance Officer cannot provide the requisite certification, he/she shall provide the Commission with a detailed explanation of: (i) any instances of non-compliance with this Consent Decree and the Rules, and (ii) the steps that LIU has taken or will take to remedy each instance of non-compliance and ensure future compliance, and the schedule on which proposed remedial actions will be taken. All compliance reports shall be submitted to the Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington, D.C. 20554, with a copy submitted electronically to Kenneth Scheibel at Kenneth.Scheibel@fcc.gov and to Dana Leavitt at Dana.Leavitt@fcc.gov.

11. **Termination Date.** Unless stated otherwise, the requirements of the Compliance Plan will expire three (3) years after the Effective Date.

12. **Voluntary Contribution.** The Licensee agrees that it will make a voluntary contribution to the United States Treasury in the amount of \$5,000. The Licensee shall make such contribution within 30 calendar days of the Effective Date. Such payment must include the Account and Facility Identification Number and the FRN Number referenced in the caption of the Adopting Order. Payments by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payments by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payments by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 270000001. For payments by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). The Licensee will also send an electronic notification on the date each payment is made to: Hillary S. DeNigro (Hillary.Denigro@fcc.gov), Ben Bartolome (Ben.Bartolome@fcc.gov), Kenneth M. Scheibel, Jr. (Kenneth.Scheibel@fcc.gov), and Dana E. Leavitt (Dana.Leavitt@fcc.gov).

13. **Waivers.** The Licensee waives any and all respective rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Order adopting this Consent Decree, provided the Commission issues an Order adopting the Consent Decree without change, addition, modification, or deletion. The Licensee shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If any Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither LIU nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and LIU shall waive any statutory right to a trial *de novo*. The Licensee hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

14. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of this Consent Decree to which LIU does not expressly consent) that provision will be superseded by such Commission rule or Order.

15. **Successors and Assigns.** The Licensee agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

16. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between them. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Act or the Commission's Rules and Orders.

17. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

18. **Paragraph Headings.** The headings of the Paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

19. **Authorized Representative.** Each Party represents and warrants to the others that it has full power and authority to enter into this Consent Decree.

20. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

P. Michele Ellison
Chief, Enforcement Bureau

Robert N. Altholz
Vice President for Finance
Long Island University Public Radio Network

Date

Date