

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

In re Application of:)		
)		
MANAHAWKIN COMMUNICATIONS)		
CORPORATION)		
)		
For Modification of Facilities and)	File Nos.	BMPH-19970228IC
Extension of Construction Permit)		BMPH-19980511JA
Station WCHR-FM)		BPH-19990407ID
Manahawkin, New Jersey)		

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 2001

Released: December 28, 2001

By the Commission: Commissioner Copps issuing a statement.

1. The Commission has under consideration an Application for Review, filed July 24, 1998, by Jersey Shore Broadcasting Corporation ("Jersey Shore"), of a June 24, 1998 letter from the Chief of the Audio Services Division, Mass Media Bureau.¹ The *June 1998 ASD Staff Decision* denied Jersey Shore's petition for reconsideration of the staff's December 8, 1997 grant of WCHR-FM's application for modification of facilities ("*First Modification Application*").² Manahawkin Communications Corporation ("MCC"), the permittee of WCHR-FM, filed an Opposition to Jersey Shore's Application for Review ("*Opposition*"), and Jersey Shore filed a Reply ("*Reply*"). Also before the Commission is a Petition for Reconsideration of the Audio Services Division's June 29, 1998 grant of MCC's request for an extension of time in which to construct the WCHR-FM facilities.³ Because the issues raised by Jersey Shore in its Application for Review and Petition for Reconsideration are related, the Mass Media Bureau has referred

¹ See *Letter from Linda Blair, Chief, Audio Services Division, dated June 24, 1998* (Reference 1800B3-JR) ("*June 1998 ASD Staff Decision*").

² See *Letter from Linda Blair, Chief, Audio Services Division, dated December 8, 1997* (Reference 1800B3-MFW) ("*December 1997 ASD Staff Decision*"). Jersey Shore filed an informal objection to the *First Modification Application* on June 2, 1997 ("*Objection*").

³ File No. BMPH-19980511JA (extended until December 29, 1998, time to construct facilities authorized in BPH-19900117MN). Previously, on December 8, 1997, over Jersey Shore's objection, the staff granted an extension (until June 8, 1998) of MCC's original construction permit. See *Letter from Linda Blair, dated December 8, 1997* (Reference 1800B3-BCD re: File No. BMPH-19971016JE). Jersey Shore did not seek reconsideration of that grant. On December 11, 1998, MCC requested another extension of its construction permit, citing the pending Application for Review as justification for the extension (File No. BMPH-19981211JE). The request was granted by the staff on February 10, 1999, and the permit was to expire August 10, 1999. On October 30, 2000, the staff granted MCC's March 5, 1999 uncontested request that the expiration date for MCC's construction permit be tolled until the contested modification proceeding is completed, pursuant to the tolling provisions in 47 C.F.R. § 73.3598(b)(ii). See *Letter from Linda Blair to Stephen Diaz Gavin, Esq., dated October 30, 2000* (Ref. 1800B3-GDG).

the Petition for Reconsideration to the Commission, pursuant to Section 1.106(a)(1) of the Rules, for resolution in conjunction with the Application for Review. In the interest of administrative efficiency, the Mass Media Bureau also has referred to us for consideration a second modification application for WCHR-FM, filed by MCC on April 7, 1999 ("*Second Modification Application*").⁴ Jersey Shore and New Jersey Broadcasting Partners, L.P. ("Partners")⁵ filed Objections to the *Second Modification Application*. Consolidating these proceedings will help to expeditiously resolve all remaining WCHR-FM application issues, and permit long-delayed station construction to commence.

2. In its Application for Review, Jersey Shore alleges that the *First Modification Application* should be denied for several reasons. It claims that MCC has transferred control of WCHR-FM to Nassau Broadcasting Partners, L.P. ("Nassau") without Commission approval. Jersey Shore also contends that MCC stands to profit impermissibly from the sale of an unbuilt construction permit by virtue of its relationship with Nassau. It also claims that MCC engaged in several misrepresentations. Finally, it argues that permitting Nassau to operate WCHR-FM pursuant to a Time Brokerage Agreement will expand Nassau's domination of the local radio market.⁶ In its Petition for Reconsideration of the staff's grant of the WCHR-FM construction permit extension request, Jersey Shore asserts the extension request should have been denied because the pending Application for Review raises serious questions regarding MCC's qualifications to retain the permit. For the reasons set forth below, we deny Jersey Shore's Application for Review and Petition for Reconsideration.

3. In its June 21, 1999 Objection to the *Second Modification Application*, Jersey Shore repeats many of the same arguments ("*Jersey Shore Objection to Second Modification Application*"). It also alleges that the facilities proposed in the *Second Modification Application* were prematurely constructed, and asserts that MCC's acknowledgment of the premature construction is further proof that MCC has transferred control of WCHR-FM to Nassau. In its June 23, 1999 Informal Objection, Partners alleges that, through the Loan and Security Agreement and the Time Brokerage Agreement, MCC has violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. For the reasons stated herein, we deny the Objections of Jersey Shore and Partners, and grant the *Second Modification Application*.

BACKGROUND

4. Jersey Shore was one of 12 applicants for a construction permit in 1990 for a new FM station to operate on Channel 289B1 at Manahawkin, New Jersey.⁷ On January 19, 1996, MCC's

⁴ See File No. BPH-19990407ID. This application seeks authorization to modify the WCHR-FM construction permit to relocate the station's facilities, eliminate grand-fathered short-spacing and increase power. The application was amended on June 2, 1999 to correct technical deficiencies. A Request for Special Temporary Authorization ("STA") to construct WCHR-FM with the facilities requested in BPH-19990407ID was filed on May 10, 1999 (File No. 19990510WW), and Jersey Shore filed an Objection to the STA request on May 24, 1999. Because our action today grants BPH-19990407ID, the STA request is dismissed as moot.

⁵ Partners is the licensee of WRAT(FM), Point Pleasant, New Jersey, which is located in the same Arbitron radio market as WCHR-FM. Jersey Shore is the licensee of WJRZ(FM), Manahawkin, New Jersey.

⁶ According to Jersey Shore, Nassau is the licensee/ broker of five other radio stations in the relevant Arbitron market.

⁷ Jersey Shore's application (File No. BPH-900117MY) was dismissed by a Hearing Designation Order ("HDO") on August 6, 1991 because it violated the inconsistent application rule. 47 C.F.R. § 73.3518. *Atlantic Radio Communications, Inc.*, 6 FCC Rcd 4716 (MMB 1991). Between the time the HDO was adopted and issued, the (continued....)

construction permit application for the Manahawkin station was granted as part of a settlement after several years of contested proceedings. *Atlantic Radio Communications, Inc.*, FCC 96M-3, Mimeo No. 60489 (A.L.J. released Jan. 19, 1996). The Audio Services Division issued the permit to MCC on May 21, 1996 (File No. BPH-900117MN) (the “*Initial Permit*”). MCC is composed of three of the original 12 applicants: Southern Ocean Broadcasting, Inc. (“Southern Ocean”), Jersey Devil Broadcasting, Inc. (“Jersey Devil”) and Great American Communications Corp. (“Great American”) (the “Licensee Shareholder Corporations”). Only Great American is a voting shareholder in MCC. On February 22, 1997, MCC filed the *First Modification Application* to, *inter alia*, relocate WCHR-FM’s transmission facilities, and Jersey Shore objected (File No. BMPH-19970228IC).⁸

5. After grant of the *Initial Permit* and prior to filing the *First Modification Application*, on February 12, 1997, MCC entered into a series of agreements with Nassau regarding WCHR-FM. They consisted of: (1) a Loan and Security Agreement (“Loan Agreement”), pursuant to which Nassau would extend a line of credit in the amount of \$1,250,000 for construction and initial operation of the station, and which would be secured by the assets of the station and a pledge of stock of MCC and its shareholders. The loan is to be forgiven if MCC sells WCHR-FM to Nassau; (2) a Time Brokerage Agreement (“TBA”), whereby Nassau is to program WCHR-FM 24 hours a day for three years, in exchange for a monthly fee to MCC and reimbursement of MCC’s expenses. Pursuant to the TBA, MCC granted Nassau a one-year option (“Option”) to acquire the stock of MCC’s shareholders for fair market value after MCC initiates program test authority, in exchange for which Nassau agreed to pay MCC’s shareholders a nonrefundable “option payment” of up to \$900,000 at the time the TBA was executed and which amount is to be credited toward the station’s purchase price if Nassau acquires the station⁹; and (3) an Option Agreement, pursuant to which Nassau Broadcast Holdings, Inc., an affiliate of Nassau’s, deposited approximately \$840,000 into escrow for *pro rata* distribution to MCC’s shareholders, as reimbursement for the preparation, filing and

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Manahawkin applicants filed a request for approval of a settlement agreement that would have, *inter alia*, granted Jersey Shore an option to acquire the Manahawkin construction permit after program test authority had commenced. Although the settlement agreement was approved by an administrative law judge in 1991, that decision was vacated by the Commission in 1992. See *Jersey Shore Broadcasting Corporation*, 7 FCC Rcd 5105 (1992), *recon denied*, 8 FCC Rcd 1383 (1993), *appeal denied*, *Jersey Shore Broadcasting Corp. v. FCC*, 37 F.3d 1531 (D.C. Cir. 1994), *reh’g denied*, No. 93-1253 (Dec. 9, 1994). See also *Jersey Shore Broadcasting*, 7 FCC Rcd 7205 (1992), *recon denied*, 8 FCC Rcd 6282 (1993) (Commission set aside portion of settlement agreement that ALJ had referred to Mass Media Bureau).

⁸ WCHR-FM’s previous call signs were WNJO(FM) and WAQB(FM).

⁹ Effective June 16, 1999, the TBA was amended to: (1) change the term of the *Option* to commence on February 16, 1999 and continue for one year from the date of filing a FCC Form 302 License Application for WCHR-FM (the “TBA Amendment”). February 16, 1999 was the effective date of a rulemaking in which the for-profit restrictions contained in Section 73.3597 were eliminated as to the WCHR-FM construction permit. See 1998 *Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056 (1998) (“*Non Technical Streamlining Report and Order*”), *recon. granted in part, denied in part*, 14 FCC Rcd 17525 (1999) (“*Memorandum Opinion and Order*”); (2) fix the Option Price for the sale of the station to Nassau at \$4,675,000; and (3) state that, if Nassau exercised the *Option*, it would deliver to each shareholder of MCC in which the *Option* was being exercised, the sum of \$400,000 (“Deposit Payment”). In the event of consummation of the sale of the stock of the shareholder corporations to Nassau, the Option Payment and the Deposit Payments will be credited toward the Option Price of \$4,675,000. The *TBA Amendment* specifically contemplates that the exercise by Nassau of the *Option* to acquire Southern Ocean’s stock will occur later than the *Option* being exercised for the stock of the other shareholder corporations, in order to accommodate the requirement of Bankruptcy Court approval.

prosecution of their applications for the Station.¹⁰ The option payment of “up to \$900,000” identified in the *TBA*, is the same as the \$837,262 that was required to be deposited into escrow for the MCC shareholders pursuant to the *Option Agreement*. See n.10, *supra*. Distribution of the escrowed funds to Southern Ocean was conditioned on bankruptcy court approval.¹¹

I. Application for Review of June 24, 1998, Staff Action Upholding Grant of First Modification Application and Petition for Reconsideration of June 29, 1998, Staff Grant of Request for Extension of Time to Build WCHR-FM

6. Jersey Shore seeks review of the staff denial of its petition for reconsideration of the grant of the *First Modification Application*. It claims the Bureau erred in failing to conclude that Jersey Shore raised a substantial and material question of fact concerning whether MCC and Nassau had engaged in an unauthorized transfer of control of WCHR-FM. Jersey Shore also contends that MCC violated the former “no profit” rule on the sale of construction permits, and misrepresented its intentions to construct the station and the financial qualifications of Southern Ocean.¹² In its Petition for Reconsideration of the staff’s grant of the extension request, Jersey Shore claims that because the Application for Review raises serious questions regarding MCC’s qualifications to retain the permit, the extension request should have been denied.

7. **Discussion.** As an initial matter, neither the Communications Act of 1934, as amended (the “Act”) nor the Commission’s rules provide for the filing of petitions to deny against minor modification applications, which is the category into which each of the three contested applications falls. 47 U.S.C. § 309(d)(1) (excluding certain types of applications from Section 309(b) provisions regarding petitions to deny).¹³ Therefore, the case law related to Section 309(d) are not controlling in the instant case.

¹⁰ The referenced documents were included as Exhibits B, C, and D in Jersey Shore’s *Objection to the First Modification Application*. The documents are referred to herein collectively as the *Financing Agreements*. The option granted in the *TBA* is the same as that referred to in the *Option Agreement*. The latter “exists in part to provide a due diligence period and tolls the time before which the Loan Agreement or LMA could become effective.” *Opposition* at 8 n.9. The *Option Agreement* requires Nassau to: (1) deposit a total of \$837,262 into escrow for the Licensee Shareholder Corporations; (2) upon completion of due diligence, pay those corporations 50% of the escrowed amount to which each is entitled (such payment to Southern Ocean being conditioned on Bankruptcy Court approval); and (3) distribute the remaining escrowed funds upon bankruptcy court approval. Both Nassau affiliated companies are referred to herein as “Nassau.”

¹¹ MCC notes that, in October 1997, in light of delays incurred in the Bankruptcy Court proceedings, Nassau determined not to proceed with securing an option to acquire Southern Ocean’s stock in MCC, and that portion of Nassau’s escrow deposit was returned. *Opposition* at 6 n.3. In September 1999, Nassau stated that it would seek Bankruptcy Court approval to acquire an option in Southern Ocean’s stock. See *Transfer of Control Transmittal Letter*, n.23, *infra*.

¹² Southern Ocean’s sole shareholder, Ms. Joan Beth Hansen (“Hansen”), filed for personal bankruptcy in June 1994. In March 1997, she sought the bankruptcy court’s approval to sell her interest in Southern Ocean to Nassau. Jersey Shore also alleged that Ms. Hansen had misrepresented her prior broadcast experience. The staff rejected Nassau’s untimely attempt to have the staff collaterally re-examine an issue ostensibly considered and rejected by the Presiding Administrative Law Judge in the comparative proceeding. *December 1997 ASD Staff Decision* at 7.

¹³ *Idaho Broadcasting Consortium*, 11 FCC Rcd 5264, n.1 (1996). Jersey Shore and Partners acknowledge as much by virtue of the fact that they filed Objections to MCC’s applications, as opposed to Petitions to Deny. The (continued....)

Michael McDermott d/b/a McDermott Communications, 11 FCC Rcd 5750, 5753 (1996). But, assuming those cases were controlling, they would still not require us to hold a hearing. Section 309 of the Communications Act erects a two-step requirement for a hearing: (1) a petition to deny must contain specific allegations of fact that, taken as true, make out a prima facie case that grant of the applications would not serve the public interest; and (2) the allegations, taken together with any opposing evidence before the Commission, must still raise a substantial and material question of fact as to whether grant of the applications would serve the public interest. See *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998); see also *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). The first step of our inquiry “is much like that performed by a trial judge considering a motion for a directed verdict: if all the supporting facts alleged in the affidavits were true, could a reasonable factfinder conclude that the ultimate fact in dispute has been established.” *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). “Allegations within these documents that consist of ultimate, conclusionary facts or more general allegations on information and belief, supported by general affidavits are not sufficient.” *North Idaho Broadcasting Company*, 8 FCC Rcd 1637, 1638 (1993), citing *Gencom Inc.*, 832 F.2d at 180, n.11. “At the second step, a substantial and material question is raised when ‘the totality of the evidence arouses a sufficient doubt on the question whether grant of the application would serve the public interest that further inquiry is called for.’” *Serafyn*, 149 F.3d at 1216, citing *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). “Should the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. § 309(d)(2).” *North Idaho Broadcasting*, 8 FCC Rcd at 1638. We conclude that, except for Jersey Shore’s allegation of unauthorized construction of the WCHR-FM facilities (see ¶ 20, *infra*), Jersey Shore and Partners have failed to establish a prima facie case that grant of the applications is inconsistent with the public interest, convenience and necessity. We further find that no substantial and material question of fact exists as to whether grant of the applications is in the public interest.

8. *Unauthorized transfer of control.* The facts alleged by Jersey Shore, even if considered true, do not establish a prima facie case that Nassau and MCC engaged in an unauthorized transfer of control of WCHR-FM. Many of the facts alleged are similar to those we have found acceptable in other cases alleging unauthorized transfer of control. Therefore, no substantial and material question of fact exists as to whether grant of the applications would serve the public interest. Under Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission’s rules, no broadcast authorization may be transferred without the Commission’s prior consent.¹⁴ In ascertaining whether a prohibited transfer of control has occurred, we have traditionally looked beyond legal title to see whether a new entity or individual has obtained the right to determine basic operating policies of the station. See *WHDH, Inc.*, 17 FCC 2d 856, 863 (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). Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming and finances, is nondelegable. See *North Texas Radio, Inc.*, 11 FCC Rcd 8531 (1996); see also *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981). The entering into of a time brokerage agreement by a licensee is not *per se* violative of the Communications Act or of any Commission rule or policy. Under a time brokerage agreement, also known as a local marketing agreement, a licensee offers station airtime to another party (usually the licensee of

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standard of proof is the same, in that informal objections must also “contain adequate and specific factual allegations sufficient to warrant the relief requested.” *Area Christian Television, Inc.*, 60 RR 2d 862, 864 (1986).

¹⁴ See 47 U.S.C. § 310(d); 47 C.F.R. § 73.3540.

another station in the market) in exchange for compensation. In return, the time broker supplies programming and sells commercial announcements to air on the brokered station. Although a licensee engaged in a time brokerage agreement is not relieved of its overarching duty to retain ultimate control, a licensee is permitted under Section 310(d) to delegate day-to-day operations, so long as the licensee continues to set the policies in these key operations. *WGPR, Inc.*, 10 FCC Rcd 8140, 8142 (1995), *Choctaw Broadcasting Corp.*, 12 FCC Rcd 8534, 8539 (1997); *Southwest Texas Public Broadcasting Council, supra*; *The Alabama Educational Television Commn.*, 33 FCC 2d 495, 508 (1972). In the past, we have stated that our examination should be particularly thorough where the broker is also the prospective purchaser of the station and was directly involved in construction and initial operational matters. *Choctaw, supra*; *Bee Broadcasting Associates*, 5 FCC Rcd 6584, 6586 (1990); *Roy M. Speer*, 11 FCC Rcd 18393 (1996). The existence of the three financial agreements between the parties here - a Time Brokerage Agreement, a loan and an option to purchase the station - is a factor in our analysis of whether a de facto transfer of control has occurred. Such determinations, however, are necessarily fact specific and must be considered on a case-by-case basis.

9. Programming. As a threshold matter, we note that the *TBA* is executory, and will not become effective until WCHR-FM initiates program testing. Therefore, concerns that MCC will lose control under the *TBA* are purely speculative. However, on its face, the *TBA* comports with agreements previously approved by the Commission.¹⁵ Specifically, MCC maintains the right to suspend or cancel programming if, in MCC's sole judgment, Nassau fails to comply with the following standards set forth in the *TBA*: (1) all programs provided by Nassau must be in good taste and in accordance with FCC requirements; (2) all programs shall be prepared and presented in conformity with regulations prescribed in the *TBA*; and (3) all advertising spots and promotional material announcements shall comply with applicable Federal, State and Local regulations and policies. *TBA* at 4. MCC also will be responsible for providing up to three hours of public service programming designed to address the issues relevant to residents in WCHR-FM's listening area on Sunday mornings, and retains ultimate responsibility for requests for political time. *TBA* at 5. MCC has the unfettered right to preempt programming it finds to be unsuitable for broadcast or the broadcast of which it believes would be contrary to the public interest. *TBA* at 9. Finally, MCC will have complete control over the policies, programming and operations of the station, including, without limitation, the right to decide whether to accept or reject any programming or advertisements, and the right to preempt any programs provided by Nassau with other programs deemed by MCC to be of greater national, regional or local interest. *TBA* at 8. In sum, the terms of the *TBA* confirm that ultimate control for programming will remain with MCC.

10. Personnel. A review of the second indicia of control also fails to provide support for Jersey Shore's allegations. Pursuant to the *TBA*: Nassau and MCC will be responsible for their respective employees; MCC's general manager shall direct the day-to-day operations of the station and report solely to MCC's officers; MCC will be responsible for the Station personnel necessary to broadcast Nassau's programs; MCC will determine salaries for the station's general manager, chief operator and other necessary employees; all station personnel shall be subject to the supervision and direction of MCC's general manager and/or chief operator; MCC employees shall maintain the local public inspection file; and, when selling commercial time, Nassau employees must affirmatively state to third parties that Nassau is acting as a time broker of WCHR-FM's commercial inventory and programming only, and that except for

¹⁵ See, e.g., *Gisela Huberman, Esq.*, 6 FCC Rcd 5397 (MMB 1991); *J. Dominic Monahan, Esq.*, 6 FCC Rcd 1867 (MMB 1991); *Peter D. O'Connell, Esq.*, 6 FCC Rcd 1869 (MMB 1991); *Brian M. Madden, Esq.*, 6 FCC Rcd 1871 (MMB 1991); *Roy R. Russo, Esq.*, 5 FCC Rcd 7586 (MMB 1990); and *Joseph Belisle, Esq.*, 5 FCC Rcd 7585 (MMB 1990).

its role as a time broker, has no control over station programming, finances, or operations.¹⁶

11. Finances. Nassau has agreed to loan MCC up to \$1,250,000 to construct and initially operate the station, will reimburse MCC for its expenses associated with operating WCHR-FM, will make a monthly *TBA* payment to MCC, and pursuant to the *Option Agreement*, has partially reimbursed MCC's shareholders for expenses. We do not conclude that the *Financing Agreements* represent an abdication by MCC of control over finances for the station. Nassau has taken a security interest in MCC's assets, and MCC's shareholders have pledged their stock to Nassau as security for Nassau extending a line of credit to construct and operate the station. In the event Nassau does not acquire the station, MCC is obligated to repay the loan with accrued interest. *Loan Agreement* at 6. In fact, MCC notes that, as of August 21, 1998, it had requested and/or been paid on draws on the loan totaling \$96,098.77 in order to pay legal and engineering expenses related to this administrative proceeding and to make a down payment for equipment. *Opposition* at 7. The WCHR-FM equipment and fixtures are, and shall remain, the sole property of MCC (*TBA* at 6), which is critical in the event Nassau does not broker or acquire WCHR-FM and MCC must program and operate the station. This differs from the situation in *Choctaw*, wherein legal title to the equipment was held by the broker and the broker purchased the equipment for the licensee's use. *Choctaw*, 12 FCC Rcd 8541-8542. The \$15,000 initial monthly *TBA* payment and reimbursement of expenses to MCC under the *TBA* appear to constitute the sole source of income for MCC during the *TBA* term. However, as in *Choctaw* and *WGPR, Inc.* the *TBA* is, in all material respects, consistent with "those we have previously approved and is not atypical of such contractual arrangements for making airtime available to a broker in exchange for consideration calculated to incorporate the station's fixed and operating costs plus a built in profit." *Choctaw*, 12 FCC Rcd at 8541; *WGPR, Inc.*, 10 FCC Rcd at 8145. "So long as the time brokerage arrangement is one which retains the ultimate decision-making authority in the licensee, the receipt of [the monthly payment] does not amount to an abdication of its control over finances." *WGPR, Inc.*, 10 FCC Rcd at 8145. As we did in *WGPR, Inc.*, we caution all licensees who "engage in time brokerage agreements that they 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 to operate independently from the broker at any time it believes the arrangement does not fulfill its public interest responsibilities." *Id.* A review of the WCHR-FM *TBA* indicates that these concerns have been adequately addressed by MCC.

12. The only other funds that Nassau has advanced to MCC or its shareholders are the payments made to Great American and Jersey Devil (and placed in escrow for Southern Ocean) pursuant to the *Option* granted in the *TBA* and the *Option Agreement*. The payments made under the *Option Agreement* are to be applied toward the purchase price should the station be sold to Nassau. The *Option* confers upon Nassau, the optionee, the right to purchase WCHR-FM at a later date; it is not a binding contract for sale of an unbuilt station. In order to become a binding commitment, Nassau must affirmatively exercise its option. See *WWOR-TV, Inc.*, 6 FCC Rcd 193, 198 n. 11 (1990), *recon. denied*, 6 FCC Rcd 6569 (1991) (options are not counted until exercised). Standing alone, an unexercised option does not represent a relinquishment of control. *M & M Broadcasting Co.*, 17 RR 1215, 1252 (I.D. 1958). See also *Atlantic Coast Broadcasting Corp. of Charleston*, 22 RR 1045, 1050 (1962) (existence of unexercised option to acquire outstanding voting stock was not sign of relinquishment of control of

¹⁶ In a December 31, 1999 Supplement to Application for Review, Jersey Shore alleges further proof that MCC has ceded control to Nassau. The Supplement consists of Jersey Shore's June 21, 1999 *Objection to Second Modification Application*. We note that the Supplement was filed well after the *June 1998 ASD Staff Decision*. As such, it is barred by 47 C.F.R. § 1.115(c). In any event, the issues raised in the Supplement are being considered in connection with the *Second Modification Application*. See ¶¶ 20-24, *infra*.

permittee); and *GTE Corporation*, 15 FCC Rcd 14032, 14059-14069 (2000) (Commission determined that retention of conversion rights regarding voting stock did not constitute equity interest). In *GTE*, the Commission cited with approval *Zaragoza* for its conclusion that paying for a contingent conversion right up front does not automatically render the conversion right a present interest triggering certain ownership restrictions. *GTE*, 15 FCC Rcd. at 14068. While MCC is bound to sell the station to Nassau should Nassau exercise its *Option* to acquire¹⁷, MCC cannot force Nassau to buy the station. *WWOR-TV, Inc.*, 6 FCC Rcd at 198. As such, the *Option* itself is not evidence of an unauthorized transfer of control.

13. Similarly, the restrictions in the *Loan Agreement* (e.g., limits purposes for which Line-of-Credit draws may be used; MCC may not issue additional shares of stock) are commercially reasonable lending terms and are consistent with loan agreement provisions previously found acceptable by the Commission. See *Flathead Valley Broadcasters (KOFI)*, 5 RR 2d 74 (Rev. Bd. 1965) (loan agreement limits officers' salaries and capital expenditures, and prohibits bonuses, loans to officers, dividends, and the sale of stock); *Data Transmission Co.*, 44 FCC 2d 935, 936 (1974) (agreement limits sale of stock, merger, selling or leasing assets, purchasing stock, or making or guaranteeing loans); *National Broadcasting Company, Inc.*, 6 FCC Rcd 4882, 4883 and n.2 (1991) (agreement requires prior consent to amend certificate of incorporation, sell assets, dissolve company, acquire or merge with another corporation, incur indebtedness not in ordinary course of business). The *Loan Agreement* appears to be consistent with other such agreements we have approved in that it allows for expenditures necessary for MCC to build and operate WCHR-FM in compliance with FCC rules.¹⁸ Furthermore, Nassau and MCC acknowledge in the *Loan Agreement* that, notwithstanding anything to the contrary contained in the *Loan Agreement*, Nassau will not take control of or manage the operation of the Station, nor will it take any action pursuant to the *Loan Agreement* in furtherance of its security interest which would constitute or result in the transfer of control or the assignment of any FCC licenses without the prior written consent of the FCC. *Loan Agreement* at 14-15. Restrictions such as those in the *Loan Agreement*, "for the express purpose of protecting a lender's investment, do not necessarily represent a transfer of control requiring Commission approval." *Data Transmission*, 44 FCC 2d at 936, citing *Flathead Valley Broadcasters*, 5 FCC 2d 74. We believe the *Financing Agreements*, taken as a whole, represent a financing package that complies with Commission rules and precedent and do not transfer control of WCHR-FM to Nassau.

14. Jersey Shore insists that the Commission has previously found evidence of an illegal transfer of control where parties have entered into similar arrangements as those in the instant case. Jersey Shore's reliance on *Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), *aff'd*, 50 RR 2d 1346 (1982) and *Salem Broadcasting, Inc.*, 6 FCC Rcd 4172 (MMB 1991)¹⁹ is misplaced. In *Stereo Broadcasters*, the Commission concluded that the record established a "pervasive pattern by Stereo of deliberate deception and defiance of the Commission's rules. Stereo's principals consummated a transfer of control in the face of Commission notification that such a transaction was illegal and endeavored to conceal the fact of the transfer from the Commission." *Stereo Broadcasters, Inc.*, 50 RR 2d at 1348. In *Salem Broadcasting*, the

¹⁷ Nassau has exercised the *Option*. See n.23, *infra*.

¹⁸ We note that the *Loan Agreement* is very specific in detailing expenditures that are permissible. However, the expenditures identified as being permissible appear to be sufficient to permit MCC to build and initially operate WCHR-FM. Furthermore, as noted by MCC, the *Loan Agreement's* limits on expenditures serve to counter the suggestion raised by Jersey Shore that MCC has profited impermissibly from the *Loan Agreement*. *Opposition to Objection to First Modification Application* at 12. See n.25, *infra* and accompanying text for discussion of "no profit" rule.

¹⁹ See *Application for Review* at 12 n.16.

Mass Media Bureau found an unauthorized transfer of control as evidenced by the licensee's "decided lack of control over station finances," the broker's "undue amount of control in making decisions as to the construction of the station," the intermittent visits to the station by the licensee, the broker's refusal to use the transmitter acquired by the licensee, and an undocumented 'loan' to the licensee. *Salem Broadcasting, Inc.*, 6 FCC Rcd at 4172-4173. The facts found to be so egregious in those cases are not present here. Based on the totality of the evidence before us and Commission precedent, as discussed *supra*, we find that Jersey Shore has failed to establish a prima facie case that MCC has engaged in an unauthorized transfer of control through the *Loan Agreement*, *Option Agreement* and *TBA*, and therefore conclude no substantial and material question of fact exists whether grant of the applications will serve the public interest.

15. *Unbuilt Station/ No-profit rule.* The former prohibition on the payment upon assignment or transfer of an unbuilt station, as contained in 47 C.F.R. § 73.3597, restricted a Seller's compensation to the legitimate and prudent expenses incurred in the application for, and construction and initial operation of the station.²⁰ The so-called "no-profit rule" was intended to "preclude trafficking in construction permits for unbuilt stations by barring the use of such permits as a means of obtaining financial gain from their transfer before the original grantee builds and operates the station."²¹ Jersey Shore alleges that the *Financing Agreements* between MCC and Nassau amount to an "up-front sale with consummation postponed until after the station goes on the air," and thus violate Section 73.3597. *Application for Review* at 9. Jersey Shore asserts that, taken as a whole, the *Financing Agreements* raise a material and substantial question of fact as to whether MCC willfully contracted to profit from the sale of its unbuilt construction permit. MCC counters that there has not been any illegal profit on the part of MCC. *Opposition to Application for Review* at 6.

16. Although the "no profit" rule was eliminated in 1999 with regards to most construction permits, because the rule was in effect at the time Nassau and MCC entered into the *Financing Agreements* in February 1997, we must determine whether the parties complied with the rule at that time.²² ²³ We

²⁰ Former Section 73.3597(c) provided that the consideration paid for the assignment or transfer of control of the construction permit for an "unbuilt station" may not exceed "the aggregate amount clearly shown to have been legitimately and prudently expended and to be expended by seller, solely for preparing, filing and advocating the grant of the construction permit for the station, and for other steps necessary toward placing the station in operation." 47 C.F.R. § 73.3597(c).

²¹ See *Assignment and Transfer of Construction Permits for New Broadcast Stations (Section 1.597 of the Commission's Rules)*, 16 FCC 2d 789 (1969). Trafficking is defined as speculation, barter or trade. See *Amendment of Part I of the Commission's Rules Adding Section 1.365 Concerning Applications for Voluntary Assignments or Transfers of Control*, 32 FCC 689 (1962).

²² See *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056 (1998) ("*Non Technical Streamlining Report and Order*"), recon. granted in part, denied in part, 14 FCC Rcd 17525 (1999) ("*Memorandum Opinion and Order*"); see also n.9, *supra*.

²³ In the September 13, 1999 letter transmitting the application to transfer control of MCC to Nassau, MCC's counsel stated that the "Commission has now expressly permitted the sale of unbuilt construction permits without any limitation on the consideration to the permittee." See September 13, 1999, Letter from Stephen Diaz Gavin to Magalie Roman Salas, transmitting FCC Form 315 for WCHR-FM ("*Transfer of Control Application Transmittal Letter*"). In a September 27, 1999 Amendment to the *Transfer of Control Application*, Nassau informed the Commission that the *TBA* was amended as described in n.9, *supra*. The parties had previously stated that the purchase price would be the fair market value at the time the *Option* contained in the *TBA* was exercised, which would be after Program Test Authority. Given the lifting of the no-profit restriction in *Non-Technical Streamlining Report and Order*, 13 FCC Rcd at 23071, that rule no longer prohibits Nassau from (continued....)

conclude that Jersey Shore has failed to establish a prima facie case that MCC has violated 47 C.F.R. § 73.3597.²⁴ According to MCC, the payments received by it or its shareholders pursuant to the *Option Agreement* and the *Loan Agreement* did not exceed their legitimate and prudent expenses.²⁵ The *Line of Credit* advances contemplated by the *Loan Agreement* constitute continuing financial obligations.²⁶ We also note that, prior to the 1999 *TBA Amendment*, Nassau could exercise its *Option* only after a license application was filed, and pursuant to former Section 73.3597(c), once the license application was filed, there would be no limit on the consideration that could flow to MCC as a result of the sale of the WCHR-FM authorization. We find that the *Option Agreement* is consistent with others approved by the Commission and does not constitute an upfront payment with consummation postponed. *See, E.g., WWOR-TV, Inc.*, 6 FCC Rcd 6569, 6571 n.13 (1991) (Commission determined that until exercised, option not cognizable in context of alien ownership question); *see also, Richard R. Zaragoza, Esq.*, 14 FCC Rcd 1732, 1743 (MMB 1998) (up-front option payment does not change fact that option may not be exercised). “[B]ecause an option is not a binding contract and does not become one until it is exercised, the existence of such a contract is not *per se* evidence of an up-front sale.” *Id.* at 1743, citing *William Silva, Esq.*, Reference 1800B3-MFW (MMB July 24, 1995), at 5, *recon. denied, sub nom. Choctaw Broadcasting Corporation*, 12 FCC Rcd. 8534 (1997) (parties did not seek reconsideration of the discussion concerning 47 C.F.R. § 73.3597). According to MCC, the *Option* payments constitute less than the legitimate and prudent expenses incurred by the shareholder corporations to obtain the WCHR-FM *Initial Permit*.²⁷ In support thereof, we note that each MCC shareholder submitted itemized expenses and declarations attesting to the accuracy of those expenses. *Opposition to Objection* Exhibits 1, 2, and 3. Contrary to the situation in *Integrated Communications Systems, Inc., of Massachusetts*, 17 FCC 2d 628 (1969), MCC has shown that the *Option* payments bear a direct relationship to the expenses incurred by MCC’s shareholders. In *Integrated Communications*, the Commission designated for hearing the question of whether Integrated

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acquiring WCHR-FM for a price in excess of MCC’s expenses, nor does it prohibit Nassau from acquiring the WCHR-FM construction permit prior to MCC filing a license application or initiating program tests.

²⁴ In the *December 1997 ASD Staff Decision*, which was upheld on reconsideration, the staff determined that “the relevant provisions of Section 73.3597 apply only in the context of an application to assign or transfer control of a construction permit for an unbuilt station.” *Id.* at 4. The staff stated that no such application was under review. Furthermore, the staff said MCC maintained that Nassau had advanced MCC no funds except for the reimbursements for documented expenses under the *Option Agreement*, and the other agreements (e.g., *Loan Agreement* and *TBA*) had not yet been effectuated. *Id.*

²⁵ *See Opposition to Objection to First Modification Application* at 11-12, n.13 and accompanying declarations of principals of Great American, Jersey Devil and Southern Ocean, in which they confirm that the \$235,497 paid to Great American, \$246,640 paid to Jersey Devil, and \$357,125 escrowed for Southern Ocean constitute a reimbursement of less than their legitimate and prudent expenses. Section 18A.1 of the *TBA* states: “As of the date of this Agreement, the Option Payment does not exceed the reasonable and prudent expenditures of the Licensee Shareholder Corporations to prepare, file and prosecute their applications to the Commission for the Station, plus all other expenditures of the Licensee and the Licensee Shareholder Corporations towards construction of the Station.” *TBA* at 17-18. Furthermore, as noted in ¶ 11, *supra*, as of August 21, 1998, MCC had requested and/or been paid on draws on the loan totaling \$96,098.77 in order to pay for legal and engineering expenses related to this administrative proceeding and to make a down payment for equipment, and that those obligations are accruing interest. *Opposition to Application for Review* at 7.

²⁶ Pursuant to the *Loan Agreement*, no interest or principal is due on the *Line of Credit* until the third anniversary of the first draw-down, unless previously repaid or forgiven. *Loan Agreement* at 6.

²⁷ *See* n.25, *supra*.

engaged in trafficking of its construction permit for an unbuilt station because Integrated stockholders received \$250,000 in exchange for granting an option to a potential buyer, despite the fact that there was no indication that the \$250,000 bore any relationship to moneys expended by the stockholders. *Id.* We conclude that the payment to MCC's shareholders by Nassau for the option to acquire MCC's stock at a later date is not contrary to Commission policy, and is not an indication that MCC has profited impermissibly from an unbuilt construction permit. Given that: (1) total payments to MCC's shareholders pursuant to the *Option Agreement* do not exceed the legitimate and prudent expenses incurred by MCC's shareholders in prosecuting their and the merged MCC applications; (2) prior to the *TBA* being amended, the *Option* would not be exercised until the station had gone on the air at which time a fair market value would be established for WCHR-FM; and, (3) the advances thus far under the *Loan Agreement* constitute continuing obligations of MCC, we conclude that Jersey Shore failed to establish a prima facie case that MCC contracted to profit from the sale of an unbuilt construction permit in violation of Section 73.3597(c) of the Commission's rules, as in effect at the time Nassau and MCC entered into the *Financing Agreements*. Therefore, there is no substantial and material question of fact that the applications are in the public interest.

17. *Misrepresentation Regarding Intention to Construct.* Jersey Shore asserts reversible error in the Bureau's failure to address claims that MCC never intended to construct the station, as evidenced by MCC entering into negotiations with Nassau "mere days" after grant of the Initial Permit on May 31, 1996. *Application for Review* at 13.²⁸ We note that the Bureau did not address this allegation in the *December 1997 ASD Staff Decision*. However, we do not believe that this omission constitutes reversible error. Jersey Shore's speculative and wholly unsupported allegations fail to establish a prima facie case that some deception occurred, much less that MCC intended to deceive the Commission.²⁹ See *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Garden State Broadcasting Ltd. Partnership v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993). Each MCC shareholder filed its application for the new Manahawkin allotment in 1990, well before Nassau's negotiations with MCC began in 1996. We believe that the perseverance of MCC's shareholders and their principals through more than 10 years of comparative hearings and administrative and judicial wrangling, for which they incurred approximately \$840,000 in legal and engineering fees prior to Nassau's involvement with MCC belies the suggestion that MCC's shareholders did not intend to construct the station. Therefore, we are unable to conclude that there is a substantial and material question of fact as to whether grant of the applications will serve the public interest.

18. *Hansen Bankruptcy and Southern Ocean Financial Qualifications.* We also find without merit Jersey Shore's contention that Joan Beth Hansen's bankruptcy filing (*see* n.12, *supra*) should have been reported to the Commission, or that Southern Ocean's continued representation of financial ability raises candor questions. Pursuant to 47 C.F.R. § 1.65 an applicant is required to amend its application

²⁸ In a Certification filed by counsel for Nassau in the bankruptcy proceeding, a copy of which Jersey Shore attached to its *Objection to First Modification Application* as Exhibit A, Nassau stated it had been "talking to and negotiating with [MCC] for over nine months" regarding the possible purchase of the Manahawkin construction permit. Certification of Attorney Timothy R. Smith, dated March 3, 1997, filed in Hansen bankruptcy proceeding. *In the Matter of William Anthony Hansen and Joan Beth Hansen*, No. 93-33346/KCF (Bankr. D. NJ).

²⁹ First, Attorney Smith's statement is not clear as to the exact date on which MCC and Nassau commenced negotiations. Therefore, Jersey Shore's statement that it was mere days after grant is unsupported and speculative. Secondly, even if the negotiations began within days of MCC obtaining the construction permit, this is not proof that MCC "never intended to construct" WCHR-FM, as Jersey Shore alleges.

within 30 days whenever there has been a substantial change to any matter which may be of decisional significance. *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 946 (Rev. Bd. 1982). At the time Hansen and her husband filed for bankruptcy court protection in 1994, the Commission had already approved the merger of Southern Ocean (as a nonvoting shareholder) into MCC, and Southern Ocean's application for the Manahawkin permit had been dismissed. *Atlantic Radio Communications, Inc.*, FCC 93M-66, Mimeo No. 30823 (A.L.J., rel. February 9, 1993). Furthermore, Jersey Shore has failed to establish a prima facie case that Hansen's personal bankruptcy affected MCC's financial qualifications, and therefore we do not conclude the bankruptcy was decisionally significant information that should have been reported. *Omaha TV 15, Inc.*, 102 FCC 2d 875, 886 (Rev. Bd. 1985), citing, *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 948 (no issue added where petitioner failed to demonstrate how bankruptcy of company largely owned by one of applicant's shareholders impacted applicant's financial or other qualifications); see also *F.E.M. Ray, Inc.*, 7 FCC Rcd 848, 849 n.3 (1992) (petitioner had not shown that the bankruptcy of one of applicant's shareholders negatively affected applicant's financial qualifications). Because we find no Section 1.65 violation, Jersey Shore's lack of candor attack founded on this purported rule violation must fail.³⁰

19. **Conclusion Regarding Application for Review and Petition for Reconsideration.** After carefully examining the arguments raised in the *Application for Review*, we conclude that Jersey Shore has failed to set forth allegations of fact sufficient to establish a prima facie case that: (1) Manahawkin Communications Corporation and Nassau Broadcasting Partners, L.P. engaged in a premature transfer of control of the construction permit for WCHR-FM; (2) the no-profit provisions of the former 47 C.F.R. § 73.3597 were violated by the *Financing Agreements*; and (3) MCC and Southern Ocean engaged in misrepresentation by failing to disclose Joan Beth Hansen's personal bankruptcy filing. Therefore, no substantial and material question of fact exists as to whether grant of the *First Modification Application* is in the public interest. Given that our action herein upholds grant of the *First*

Modification Application, it is appropriate to also uphold grant of the construction permit extension request.

II. Jersey Shore and Partners' Informal Objections to Second Modification Application filed

³⁰ For the first time in its *Application for Review*, Jersey Shore asserts that the *TBA* will permit Nassau to expand its domination of the Monmouth-Ocean, New Jersey Arbitron radio market, which includes WCHR-FM. Attached to the *Application for Review* is a copy of an April 2, 1998 "Request for Commission Inquiry into Nassau Broadcasting Partners, L.P." (the "Request") in which Jersey Shore asks the Commission to investigate the alleged anti-competitive actions by Nassau in the Monmouth-Ocean, New Jersey Arbitron market. The *June 1998 ASD Letter* referenced the *Request* and noted that it would be handled separately. MCC argues that Jersey Shore's request for a review of the anticompetitive effects of the *TBA* is barred from consideration pursuant to 47 C.F.R. § 1.106(f) because it is an untimely petition for reconsideration, and 47 C.F.R. § 1.115(c) because the staff has not had an opportunity to pass on the allegations. In any event, we do not believe that consideration of the potential anti-competitive effects of the *TBA* is germane to our review of the staff's grant of the modification application, which is technical in nature. We note that a *TBA* is an attributable interest, and Nassau will have to be in compliance with 47 C.F.R. § 73.3555, once the *TBA* is implemented. We note that an application to transfer control of Great American's and Jersey Devil's interest in MCC to Nassau was filed September 13, 1999, and is pending (File No. BTCH-19990913GI). See n.23, *supra*. Jersey Shore and Partners filed Petitions to Deny that application because, *inter alia*, of the potential anti-competitive effects of the transaction. Because WCHR-FM is unbuilt and the station is not operating pursuant to the *TBA*, we need not, therefore, reach the impact of such TBAs on competitive conditions in the relevant market in this decision. We will consider those concerns about competition in the context of the transfer of control application.

April 7, 1999.

20. In addition to repeating its unauthorized transfer of control and “no profit” arguments, Jersey Shore’s July 21, 1999 *Objection to the Second Modification Application* alleges that the facilities proposed in the *Second Modification Application* were prematurely constructed, in violation of 47 U.S.C. § 319, at the direction of a consulting engineer retained by Nassau.³¹ Jersey Shore also alleges that Nassau has assumed complete control of the construction of WCHR-FM, as shown by address labels on equipment packaging addressed to Nassau’s station WQNJ-FM or its engineer, Dave Brown, that were found at the WCHR site. *Jersey Shore Objection to Second Modification Application* at 5-6. Jersey Shore notes that Nassau is a lessee on the proposed WCHR-FM tower, but no facilities licensed to Nassau are located there. *Id.* at 6, n.2. In its *Opposition to Jersey Shore’s Objection to Second Modification Application*, MCC admits that the station was prematurely constructed, but claims it occurred because MCC’s consulting engineer, Charles Hecht, mistakenly believed it was permissible to build the proposed facilities provided they were not energized. *Id.* at 4. MCC submits a sworn statement from Mr. Hecht, stating that he was contacted in May 1999 by Anthony Gervasi, Nassau’s vice president for engineering and technology, regarding the possibility of constructing the station prior to FCC approval, but not energizing the facilities.³² Hecht presumed that this situation had or would be discussed with appropriate representatives of MCC. *Opposition to Jersey Shore Objection to Second Modification Application* at 2. He has since learned that the matter had not been discussed with the permittee or any of its officers, directors, shareholders or counsel. *Id.* MCC claims it continues to be in control of the station, as evidenced by the fact it ordered the dismantling of the station, which occurred on July 8 and 9, 1999, shortly after learning of the unapproved construction.³³ MCC asserts that the station has been dismantled, the antenna placed in storage and the transmission line scrapped. *Opposition to Jersey Shore Objection to Second Modification Application* at 6. MCC takes issue with Jersey Shore’s continuing reference to Mr. Hecht being a consultant for Nassau, and stresses that Mr. Hecht has acted as MCC’s agent regarding WCHR-FM. *Id.* at 12, n.8. MCC reiterates that there has been no unauthorized transfer of control as asserted by Jersey Shore, and suggests that the ability of MCC to order the dismantling of the station demonstrates its ultimate control. *Id.* at 9. Jersey Shore asserts that Nassau’s involvement with MCC and the proposed WCHR-FM facilities cannot survive the scrutiny the Commission has given to similar arrangements. *See Roy M. Speer*, 11 FCC Rcd 18393 (1996), *recon. denied in part and forfeiture rescinded*, 13 FCC Rcd 19911 (1998) (*see* ¶ 22, *infra*), and *Choctaw Broadcasting Corp.*, 12 FCC Rcd 8534 (1997) (*see* ¶ 11, *supra*). *Jersey Shore Objection to Second Modification Application* at 6-7.

21. In Partners’ June 23, 1999 *Objection to Second Modification Application*, it alleges that the Agreements between Nassau and MCC violate Section 1 of the Sherman Act because they permit Nassau to control the advertising sales for a potential competitor in the Monmouth-Ocean, New Jersey radio market, without presenting offsetting procompetitive benefits.³⁴ MCC argues that the *Objection* is

³¹ Jersey Shore earlier filed an *Objection to the Second Modification Application* on May 11, 1999, alleging technical deficiencies. Those were addressed/corrected in the June 2, 1999 Amendment. *See* n.4, *supra*.

³² *See* Declaration of Charles A. Hecht, dated July 21, 1999, Attachment 2 to *Opposition to Jersey Shore Objection to Second Modification Application* (“Hecht Declaration”) at 2.

³³ *See Hecht Declaration* at 3, wherein Hecht states that an associate of his company supervised the “deconstruction” on July 8, and he supervised on July 9. Hecht also states that, as MCC’s consultant, he has taken possession of the transmitter’s exciter and transmission line jumper, and will retain these in his office until the Commission acts on the *Second Modification Application* or the STA request. *Id.*

³⁴ Partners’ *Objection* was filed with the Commission concurrently with the filing of a Complaint with the U.S. (continued....)

late-filed and that Partners' antitrust allegations are not properly lodged against a technical application.³⁵ MCC asserts that Partners' Objection is intended to delay the onset of competition to serve the Manahawkin area, and is in retaliation for MCC rebuffing Partners' entreaties to buy WCHR-FM, and that such motives are no basis for denial of an application. *Id.* at 2. MCC seeks the imposition of a forfeiture against Partners because of this so-called "frivolous" filing. *Id.* at 3.

22. **Discussion. *Premature Construction.*** We find that Jersey Shore has established a prima facie case that the facilities proposed for WCHR-FM in the *Second Modification Application* and the STA request, were constructed without Commission authorization. However, based on the facts of this case and the relevant case law, we do not conclude that a substantial and material question of fact exists as to whether grant of the *Second Modification Application* is in the public interest, and therefore will not designate this issue for hearing. By MCC's own admission, the facilities were constructed sometime between May and June 1999, prior to a grant from the Commission.³⁶ This action constitutes a violation of section 319(a) of the Communications Act, 47 U.S.C. § 319(a). We note that the usual sanction for unauthorized construction is a forfeiture, as opposed to denial of application. *See Commission's Forfeiture Policy Statement*, Report and Order, 12 FCC Rcd 17087, 17113 (1997) (base forfeiture for construction and/or operation without instrument of authorization is \$10,000). *See also, California State University at Sacramento*, 14 FCC Rcd 3825 (DA-99472) (MMB 1999) (Notice of Apparent Liability ("NAL") issued where permittee installed antenna, transmitter, transmission line and related wiring prior to Commission authorizing modification application); *Spectrum Broadcasting Corporation*, 12 FCC Rcd 7724 (MMB 1997) (construction of facilities not in accordance with construction permit, and operation of such unauthorized facilities did not bar grant of pending applications, but did result in issuance of NAL); *Rasa Communications Corp.*, 11 FCC Rcd 13243 (MMB 1996) (NAL issued for similar violations).³⁷ However,

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Department of Justice ("DoJ"). The Complaint seeks an investigation into allegations that the MCC/Nassau Agreements, combined with a July 1, 1996 Time Brokerage Agreement ("TBA") with North Shore Broadcasting Corporation and Seashore Broadcasting Corporation for WOBM(FM) Toms River, New Jersey, and WOBM(AM) Lakewood, New Jersey, will permit Nassau to control nearly 60% of the market revenues and 56% of the audience in the Monmouth-Ocean, New Jersey Arbitron market. As a Class B1 station, WCHR-FM will be the most powerful FM in the market, and will serve a population substantially larger than any other FM in the market, according to Partners. Partners incorporates by reference into its Objection the allegations raised in the Complaint.

³⁵ See MCC Opposition to Objection by New Jersey Broadcasting Partners, L.P., filed August 6, 1999, at 8-9.

³⁶ MCC denies Jersey Shore's allegations that it engaged in misrepresentation in its May 10, 1999 STA request, when its counsel stated "equipment for the Station is already being ordered, which would allow for prompt construction upon grant of Commission approval of this STA request." Given the premature construction, Jersey Shore alleges MCC materially misrepresented its intentions in the STA request. MCC and its counsel counter that they first learned of the premature construction when served with the Jersey Shore Objection in June 1999. *See Declaration of Stephen Diaz Gavin*, included in *Opposition to Jersey Shore Objection to Second Modification Application*. We find that Jersey Shore has failed to establish a prima facie case that Gavin and/or MCC engaged in misrepresentation in the STA request. We are satisfied that, given MCC's lack of knowledge that the WCHR-FM facilities had or would be prematurely constructed, they lacked the requisite intent to deceive the Commission when the STA request was filed in May 1999. *See Trinity Broadcasting of Florida, Inc.* 10 FCC Rcd 12,020, 12063 (1995) (necessary and essential element of misrepresentation is intent to deceive).

³⁷ There is no indication that MCC intentionally violated Section 319(a); as such we do not believe it appropriate to issue an order to show cause why WCHR-FM's construction permit should not be revoked. *See, e.g., Equivox, Inc.* 50 RR 2d 430 (1981)(Commission suggested that a finding of bad faith on part of permittee might have resulted in revocation proceedings).

because more than one year has passed since the rule violation occurred, we are statutorily barred from issuing a NAL in this case. See 47 U.S.C. § 503(b)(6)(B) (forfeiture cannot be imposed on a person not holding a broadcast station license “if the violation charged occurred more than 1 year prior to the date of the issuance of the required notice”). See *California State University at Sacramento*, 14 FCC Rcd 10018 (MMB 1999) (cancellation of NAL for unauthorized construction during pendency of application to modify construction permit because more than one year elapsed from date of unauthorized construction and date of NAL). See also *Roy M. Speer*, 13 FCC Rcd 19911, 19920-21 (1998). While we are barred from issuing a NAL and while we believe denial of the *Second Modification Application* is not in the public interest, we admonish MCC for this violation of the Act and caution MCC to ensure that such actions are not repeated.

23. *Unauthorized Transfer of Control.* Although we conclude that Jersey Shore raised a prima facie case that the WCHR facilities had been constructed without authorization, we do not agree with Jersey Shore that Nassau’s involvement with the premature construction is proof that an unauthorized transfer of control has occurred. As support for its allegation that Nassau has assumed complete control of the construction of WCHR-FM, Jersey Shore provides photocopies of labeling addressed to Nassau or its engineer, Dave Brown, that appeared on empty equipment packaging at the WCHR-FM transmitter site. *Objection to Second Modification Application* at 5 and accompanying Exhibits.³⁸ Jersey Shore also claims that Nassau is the lessee on the proposed WCHR-FM tower, but has no licensed facilities authorized to operate on that tower. *Objection to Second Modification Application* at 6, n.2. Jersey Shore’s allegation that Nassau was the tower lessee is unsupported by an affidavit based on personal knowledge, as required by Section 309(d). In addition, Jersey Shore provides no verified information regarding the former contents of what appears to be three empty equipment boxes. Lastly, as evidenced by the photographs provided by Jersey Shore, the labeling is addressed to Nassau or to its own station, WQNJ-FM, at two different and unexplained addresses. Under these circumstances, we find Jersey Shore’s facts and statements unavailing in establishing a prima facie case. We are concerned by MCC’s admission that the construction was initiated by its consulting engineer, without the knowledge of MCC principals.³⁹ A licensee (or in this case a permittee) must maintain ultimate control over its station lest it be found to have transferred control. “While we do not suggest that a permittee must, in order to claim control of its facility, construct its station without external technical and legal assistance, it is incumbent upon a permittee to actively oversee the construction on an ongoing basis.” *Roy M. Speer*, 11 FCC Rcd at 18415. However, we note that Mr. Hecht has been MCC’s or its shareholder Great American’s consulting engineering since at least 1990 when Great American filed the application for the new FM station in Manahawkin that became the MCC construction permit. Hecht also prepared the engineering for the *Second Modification Application* and the *STA*. MCC asserts that Hecht was acting as MCC’s agent when he revised the 1998 equipment order (the order placed for the *First Modification Application*) to reflect the facilities sought in the *Second Modification Application* (e.g., made revisions to length of transmission line, antenna pattern and transmitter power).⁴⁰ Upon learning of the premature construction, MCC ordered it be dismantled

³⁸ Jersey Shore’s evidence includes: declarations of the Vice President /Secretary and the Chief Engineer of Jersey Shore who personally observed the WCHR-FM antenna already installed on the proposed tower and connected by transmission wire to the station’s transmitter; photographs of the installed antenna; and, photocopies of labeling that appeared on empty equipment packaging at the transmitter site, addressed to Nassau or its engineer. See *Objection to Second Modification Application* Exhibits.

³⁹ The current situation differs from cases in which we have not found premature construction. For example, in *Patton Communications, Inc.*, 81 FCC 2d 336 (1980) digging a hole and placing concrete footing was permissible; in *Global Broadcasting Group*, 10 FCC Rcd 5437 (1995), procuring equipment was permissible.

and Hecht oversaw the dismantling. He has taken possession of the equipment and will store it until the *Second Modification Application* or STA is granted.

24. While it appears that Nassau has been closely involved in many facets of the funding and construction for WCHR-FM, we do not believe its involvement rises to the levels found to be objectionable in *Roy M. Speer* and *Choctaw Broadcasting Corp.*, cited by Jersey Shore in its Objections. In *Roy M. Speer*, the Commission found an unauthorized transfer of control occurred where a lender “took charge of the construction project and thereafter arranged, on its own initiative, nearly every aspect of it.” *Roy M. Speer*, 11 FCC Rcd at 18414. In *Roy M. Speer*, an officer of the permittee admitted that a non-voting stockholder, who was also a lender of the permittee, had supervised the construction of the new television station, hired and paid the engineering and law firms that worked on the station’s construction, assigned employees to superintend construction, and selected and paid equipment vendors. *Id.* at 18405. In *Choctaw*, the prospective purchaser of a construction permit provided substantially all the programming on the station, selected and installed the equipment for the station, and employed the licensee’s engineer responsible for overseeing construction of the station. *Choctaw*, 12 FCC Rcd at 8542-8543. There, the Commission did not find that the facts rose to the level of concern found in *Roy M. Speer*, nor that the licensee had abdicated control, despite the fact that the permittee delegated authority to the broker to construct the station. *Choctaw*, 12 FCC Rcd at 8542. In the instant case, a consulting engineer with a ten-year working relationship with MCC and its shareholder, Great American, and acting as MCC’s agent mistakenly constructed the WCHR-FM facilities. For this action, we admonish MCC for violating Section 319 of the Communications Act. However, we are encouraged by MCC’s quick and deliberate action in ordering the immediate dismantling of the facilities. On this issue, we conclude that Jersey Shore has failed to establish a prima facie case that MCC has abdicated control of WCHR-FM to Nassau. Therefore, no substantial and material question of fact exists as to whether grant of the *Second Modification Application* is in the public interest.

25. *Undue Concentration by Nassau. Partners’ Objection to the Second Modification Application* is based entirely upon its concern that the operation by Nassau of WCHR-FM will further increase the level of concentration in the Monmouth-Ocean Arbitron radio market and place too much control in the hands of one operator, Nassau. Allegations regarding the potential anti-competitive effects of the instant *TBA* are not germane to our review of a facilities modification application. See n.30, *supra*. The Audio Services Division has determined that Nassau’s operation of WCHR-FM, pursuant to the *TBA*, currently complies with 47 C.F.R. § 73.3555. We caution Nassau and MCC that, once the *TBA* is implemented, Nassau must continue to be in compliance with the multiple ownership rules. *Id.*

26. **Conclusion Regarding Second Modification Application.** For the reasons set forth above, we find that Jersey Shore and Partners have failed to raise a substantial and material question of fact as to whether grant of the *Second Modification Application* would be inconsistent with the public interest, convenience and necessity. The Audio Services Staff has determined that the application is technically acceptable. Because we have found grant of the *Second Modification Application* to be in the public interest, the need for Special Temporary Authorization to operate with the facilities requested therein no longer exists, and the STA request is dismissed as moot.

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⁴⁰ See *Opposition to Jersey Shore Objection to Second Modification Application* at 12, n.8, wherein MCC states: “Mr. Hecht is acting as MCC’s agent, eve[n] if, in this instance, his conclusion that construction occur without energizing the Station’s facilities, was in error. In this instance, Nassau was looking to Mr. Hecht in his role as engineering consultant to MCC.” *Id.*

27. Accordingly, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Jersey Shore Broadcasting Corporation on July 24, 1998 IS HEREBY DENIED. It is FURTHER ORDERED that the Petition for Reconsideration filed by Jersey Shore Broadcasting Corporation on August 3, 1998 IS HEREBY DENIED.

28. IT IS FURTHER ORDERED, That the Application of Manahawkin Communications Corporation for Modification of Construction Permit (File No. BMPH-19990407ID) is HEREBY GRANTED, the Informal Objections filed by New Jersey Broadcasting Partners, L.P. on June 23, 1999, and Jersey Shore Broadcasting Corporation, on June 21, 1999, ARE HEREBY DENIED, and the Request for Special Temporary Authorization, filed by Manahawkin Communications Corporation on May 10, 1999 (File No. 19990510WW), IS HEREBY DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas,
Secretary.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL J. COPPS

*In re: Application of Manahawkin Communications Corporation
for Modification of Facilities and Extension of Construction
Permit Station WHCR-FM Manahawkin, New Jersey*

Although the specific facts of this case do not appear to constitute an unauthorized transfer of control, the combination of factors considered here – a Time Brokerage Agreement, a loan and an option to purchase the station – have in the past been presumed to be conducive to such unauthorized transfer. Today’s decision therefore should *not* be read to state that the combination of these factors cannot in and of itself constitute a transfer of control. A determination as to whether an unauthorized transfer occurred is necessarily fact specific and the totality of the circumstances must be considered on a case-by-case basis.

In this case, the totality of the circumstances does not seem to indicate such transfer. Some of the factors which may be relevant include, but are certainly not limited to: first, the Time Brokerage Agreement (“TBA”) is consistent with agreements previously approved by the Commission; second, the concern that MCC will lose control under the TBA is at this point speculative because said TBA does not become effective until program testing authority is begun; third, the TBA assures licensee control of some of the most important elements of its public interest obligation, giving the station the unfettered right to preempt programming it deems unsuitable or not in the public interest, or to replace it with programming it determines to be of greater interest; and, finally, the Agreement gives the licensee responsibility for public service programming addressing the needs of the community and for requests for political time.

I also note that a transaction involving Nassau and Manahawkin is pending before the Commission. Any competition issues involving these parties and their radio stations will be addressed in that proceeding and are not before the Commission in the matter approved today.