

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

MM Docket No. 90-243

In re Application of

WEINER  
BROADCASTING  
COMPANY

File No. BPIB-840904MZ

For a Construction Permit for a  
New International Broadcast Station  
at Monticello, Maine

#### Appearances

Michael Couzens, on behalf of Weiner Broadcasting Company; and Robert A. Zauner, on behalf of the Chief, Mass Media Bureau.

#### DECISION

Adopted: January 17, 1992; Released: January 29, 1992

By the Review Board: BLUMENTHAL, ESBENSEN and GREENE.

Board Member BLUMENTHAL.

1. The Board has before it the *Initial Decision*, 6 FCC Rcd 4337 (1991)(*I.D.*), of Administrative Law Judge Joseph Chachkin (ALJ) in the above-captioned case. It also has the Exceptions of Weiner Broadcasting Company (WBC or Weiner) and the Reply of the Commission's Mass Media Bureau. The *I.D.* denied the WBC application.

#### BACKGROUND

2. Filed in 1984, this application was not designated for hearing until May, 1990 because of the prior and subsequent conduct of WBC principal, Allen H. Weiner. In brief and in paramount part, the *Hearing Designation Order*, 5 FCC Rcd 2894 (1990), specified issues to determine whether Weiner had operated an AM radio broadcast station (at night) without a license from 1982 to 1984; to determine whether Weiner had violated the Commission's rules by broadcasting from Yonkers, N.Y., on only a Remote Pickup Base Station, directly to the general public in 1984; and to determine whether Weiner had operated an unlicensed radio broadcast station from an erstwhile fishing vessel anchored in Long Island Sound in 1987.<sup>1</sup>

#### INITIAL DECISION

3. Among other things, the ALJ recorded that WBC had acquired the licenses for WOZI-FM, Presque Isle, Maine in 1980 and of WOZW-AM, Monticello, Maine in 1981. Although the AM station was licensed for daytime-only operation on 710 kHz, WBC began in January 1982 to broadcast without a license on 1616 kHz as "*Pirate Radio North*" (using unassigned call letters "KPRC"), an unauthorized signal it simulcast on 6.2 MHz and 16.2 MHz. The illicit practice continued until 1984. *I.D.*, paras. 16-18. As the ALJ reports (*id.*, at para. 19):

Weiner offered no excuse for his unlicensed operation on the 1616 kHz, 6.2 MHz and 16.2 MHz frequencies. He now claims that his activities were stupid and a mistake. He says that at the time he felt it was exciting to put a signal on the air at night on a clear channel and talk to people at great distances.

In May 1985, the Maine broadcast licenses were designated for revocation hearing; but on April 24, 1986 WBC was permitted to sell the two Maine broadcast facilities under the Commission's Minority Distress Sale Policy. *Id.*, para. 38.

4. In addition to those transgressions, WBC had, in April 1984, acquired a license for a Remote Pickup Base Station at Yonkers, N.Y. Heedless of the prohibitions of Part 74 of the Commission's Rules against the use of such equipment for broadcasting to the general public, WBC operated improperly at various times from August to November of that year. *I.D.*, paras. 30-33. When Weiner's prologations were discovered, he was ordered on November 29, 1984 by the FCC's Mass Media Bureau to cease operation of the Yonkers station. Although WBC advised the FCC by letter of February 20, 1985, that it would come into compliance with Part 74, it recommenced its violations in March 1985, an action Weiner testified was "another grave mistake on my part." *See I.D.*, paras. 34-37.

5. While marketing away his Maine AM and FM broadcast licenses in early 1986 (and his Yonkers Remote Pickup Base Station licenses along therewith), Weiner was simultaneously acquiring the fishing vessel *Sarah*, *id.*, para. 42, which he registered in Honduras, and had then towed to a point in Long Island Sound 4.5 miles off of Long Beach, N.Y. From there, and (*id.*, at para. 45):

[o]n July 23, 24, 26 and 27, 1987, from 6:00 p.m. to midnight, Weiner caused transmissions to emanate from the *Sarah* on 1620 kHz with 1,000 watts of power, on 103.1 MHz with 1,000 watts power, on 6,240 kHz with 300 watts of power and on 190 kHz with 75 watts of power. The radio emissions from the *Sarah* were identified as being broadcast by "Radio New York International" (RNI). On July 23, 24, 26 and 27, 1987, neither Weiner, nor WBC, nor RNI, nor any person or entity associated with the broadcasts, held any license, permit or any other authorization to operate a radio station on 1620 kHz, 103.1 MHz, 6,240 kHz or 190 kHz.

On July 28, 1987, the *Sarah* was captured by the Coast Guard cutter *Cape Horn*, whereafter Weiner and his confederates were charged with violations of federal and international law. Criminal charges were deferred, however, upon Weiner's agreement not to resume the seaborne

broadcasts. *Id.*, paras. 46-50. Nevertheless, and trumpeting in an April 1988 magazine article that he would resume broadcasting from the *Sarah* "as soon as the warm weather arrives," Weiner sought to make good on his boast by repairing the ship's radio transmitting equipment (and generator), registering the craft with the "Principality of Sealand,"<sup>2</sup> and causing the ship to be towed to its prior anchorage. *Id.*, paras. 51-52. In August 1988, the local United States Attorney's office instituted an action to secure a Temporary Restraining Order against Weiner, but it settled once more for another agreement whereby Weiner promised not to:

"broadcast from on board the *Sarah*, or any other vessel, either within or without the national territorial waters, pending a decision by the United States District Court on Plaintiff's Motion for Preliminary Injunction."

*Id.*, at para. 54 (quoting agreement). Weiner similarly averred (*id.*):

that he would "not broadcast from the *Sarah* under any circumstances until [his] alleged right to broadcast is decided by the Court." Weiner also agreed, "as a matter of fairness" to use his "best efforts to see that no other persons -- be they defendants in this action or not -- broadcast from the *Sarah* until permitted to do so by the Court."

6. Notwithstanding that newest pledge, and in October 1988, the incorrigible Weiner engaged in the bogus transfer of the *Sarah* to a British "front" corporation he had helped conjure (with the express purpose of evading his agreement with the United States Attorney), and the renegade station recommenced its operations that very month. *Id.*, paras. 55-58. On October 17, 1988, United States District Court Judge John J. McNaught promulgated a Temporary Restraining Order (which shortly ripened into a Permanent Injunction), served upon the vessel by the Coast Guard. The ALJ writes (*id.*, at para. 58):

When confronted with the fact that the [August 1988] agreement also called for Weiner to use his best efforts to see that no other person broadcast from the *Sarah*, Weiner responded: "Yeah, the second part, I guess I really didn't read that letter too carefully." Tr. 109. Weiner also was unable to distinguish between personally broadcasting from aboard the *Sarah* and having his friends do so at his direction. Tr. 112. Weiner admitted that his agreement to discontinue unlicensed broadcasts was "disingenuous" in light of his subsequent actions. Tr. 111-112. Weiner made clear that his motive for entering into the agreement with the United States Attorney, which he did not intend to honor, was to get the ship out of port.

#### EXCEPTIONS

7. WBC concedes that "the *I.D.*, where it elaborates the designated issues, paras. 15 through 50 inclusive, are not controverted in this appeal."<sup>3</sup> These findings embrace the unlicensed operation of the Maine AM station, the improper operation of the Remote Pickup Base Station, and

many of the unsanctioned broadcasts from Long Island Sound aboard the *Sarah*. WBC contends, however, that the "*I.D.* adduced findings, at paras. 7-14 and 50-60 . . . are not within the express scope of any of the designated issues."<sup>4</sup>

8. Instead, WBC posits in its defense (1) that Weiner has never been convicted of a felony, and may not therefore be considered unqualified under the Commission's *Character Policy Statement*, 102 FCC 2d 1179 (1986), as modified, 5 FCC Rcd 3252 (1990); (2) that Weiner's offshore broadcasts did not violate 47 U.S.C. § 301, and that even if Weiner violated Article 30, Section 1 (1), Paragraph 2665, of the Radio Regulations of the International Telecommunications Union of the United Nations (ITU Radio Regulations), Weiner has never been "convicted" of these offenses which, at most he claims, are susceptible to a small fine under 47 U.S.C. § 502<sup>5</sup>; and lastly (3) that Weiner's candor and recent epiphany do not, under Commission precedent, warrant disqualification.

#### DISCUSSION

9. WBC, willfully or ignorantly, misreads the Commission's *Character Policy Statement*, whereunder the pertinent inquiry is whether the (admitted) violations of the Communications Act and FCC rules portend that the applicant cannot be relied upon for future compliance. 102 FCC 2d at 1209. The *Policy Statement's* elaborate, though subsequently modified, disquisition upon criminal convictions relates solely to "non-FCC misconduct." *see id.*, 1204-08, and WBC admits to violations of the Communications Act and FCC rules, including Part 2.100 *et seq.*, 47 CFR § 2.100 *et seq.* (incorporating ITU Radio Regulations).

10. We further apprehend that the cases cited by WBC in its quest for leniency are not controlling.<sup>6</sup> In *First Baptist Church*, 6 FCC 771 (1939), a border congregation sought and received an FCC dispensation to convey its religious services via phone line to station CKLW, Windsor, Ontario, after having previously done so in a possible, though unwitting, violation of 47 U.S.C. § 325. By contrast, WBC's violations were purposeful and plentiful. *Central Broadcasting Co.*, 11 FCC 259 (1946), involved the qualifications of an individual (John H. Stenger, Jr.), who had lost control of a Wilkes Barre, Pa. station (indeed he was *enjoined* by a local Common Pleas Court from *reclaiming* control), but reacquired grasp of the operation in 1940. Thereafter, he restored the beleaguered facility to solvency, and ran it perfectly until 1944. *See id.*, at 271-274. We have here no such admirable record. Equally distinguishable are *Front Range Educational Media Corp.*, 43 RR 2d 185 (1978) and *A & A Ready Mixed Concrete, Inc.*, 44 RR 2d 1260 (Rev. Bd. 1978). In the former, the Commission licensed an educational applicant whose president, in addition to violating the "spirit" of CPB funding regulations (for which CPB took no action and continued its funding), gratuitously admitted to several violations of the FCC's operating rules for approximately six months, because the struggling station had relied upon untrained community volunteers. In the latter, a mixed concrete company, which had previously held business licenses for many uneventful years, operated for 12 days without a license in the Industrial Radio Service, but terminated transmission on its new equipment directly upon learning that no FCC license had issued yet for the new equipment, despite the "view" of its equipment sup-

plier that the FCC had acted promptly and issued the licenses. None of these cases involve the brilliant pattern of contumacy reflected in the conduct of Weiner and WBC.<sup>7</sup>

11. We do declare that, even when an applicant has previously committed the most atrocious infractions, the Commission has permitted a showing of rehabilitation. In *L.D.S. Enterprises, Inc.*, 86 FCC 2d 283 (1981), the agency was presented with an application to acquire a broadcast license from a party who, half a decade earlier, had lost five commercial broadcast licenses for perhaps the most amoral skein of detected villainy in domestic broadcast history.<sup>8</sup> The Commission did not reject summarily that application, but invited an exhibit of palingenesis in a "paper" hearing. *Id.*, at 286.<sup>9</sup> See also *Big Country Communications*, 5 FCC Rcd 6013 (1990) (interpreting *Character Policy Statement*). At the instant hearing, Weiner proffered as follows (*I.D.*, at para. 61)<sup>10</sup>:

In support of WBC's application, Weiner submits a statement from William C. Miller, Manager, TOC Maintenance, for ABC Broadcast Operations & Engineering. Miller states that Weiner was first hired by ABC on May 14, 1988, as a temporary employee and then, after being let go by ABC was again rehired as a temporary employee on April 1, 1989. On April 28, 1989, Weiner was made a regular employee of ABC. According to Miller, who has been Weiner's supervisor during the entire course of Weiner's employment at ABC, Weiner is a "stable, reliable worker and is quite gifted technically."

And, at the time of the hearing, Weiner was also employed (apparently as an air personality) by WWCR, a licensed international station broadcasting from Knoxville, Tn. *I.D.*, n.5. Finally, WBC maintains that Weiner's reliability is assured because he remains under the onus of District Judge McNaught's Permanent Injunction, which broadly proscribes unlicensed operation by Weiner.<sup>11</sup>

12. The record on Weiner's plaint of metempsychosis is insufficient, at this juncture, to overcome his history. In *L.D.S. Enterprises*, for example, five years had elapsed since the applicant had last been denied a license; there was, thereafter, no evidence of federal violations, and still the Commission did not move to grant straight away. The same was true in *Big Country Communications*, where ten years had passed. Here, we remain in the initial process of adjudicating Weiner's alleged violations, albeit he has lately confessed of (most of) his misdeeds. But Weiner has been under the enforcement eye of this Commission since 1984, under the eye of the U.S. courts since 1987-1988, and in this hearing since May 1990. Adhering generally to the evidentiary principle that salutary conduct *post litem motem* is not entitled to very great weight, the Board finds it premature to predict Weiner's permanent adhesion to regulatory rectitude. He is little abetted by his invocation of the Permanent Injunction currently levied against him, as this would seem to neutralize any compelling inference that his most recent conduct is fairly representative of his volitive "propensity for complying with our rules and policies," the divining rod provided for use here. *Character Policy Statement*, 102 FCC 2d at 1231.

## CONCLUSION

13. On the evidence before us, and the tedious pathology it irradiates, it looks that Weiner cannot decide whether he is Hook or Peter Pan, but we have absorbed from Mr. Barrie's *fabliau* to "never smile at a crocodile." In each instance of record in which Weiner has been entrusted with a powerful transmitting license, he has disregarded its limitations. When vacant of official license, he has scoffed at federal and international law, and, on successive occasions, his own solemn oaths of redemption. Though we respect the recent assessment of his ABC supervisor, we agree with the Mass Media Bureau and discern no persuasive proof of enduring rehabilitation nor apposite precedent for the grant, *ex continenti*, of the particular license under application. Should a "decent interval" ensue without notable delict, Weiner is not estopped from applying again. *L.D.S Enterprises, supra*; *Central Broadcasting Co., supra*; *Big Country Communications, supra*. Should it not, we would rather assume criminal prosecution within the the muscular clutch of serious law.

14. ACCORDINGLY, IT IS ORDERED, That the application of Weiner Broadcasting Company (File No. BPIB-840904MZ) for a Construction Permit for a new International Broadcast Station at Monticello, Maine IS DENIED.

## FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal  
Member, Review Board

## FOOTNOTES

<sup>1</sup> The full scope of issues designated follows:

- (a) To determine whether Weiner operated a radio station on 1616 kHz in Monticello, Maine, at various times from January 31, 1982, through July 16, 1984, without a Commission authorization, in violation of Section 301 of the Communications Act of 1934, as amended;
- (b) To determine whether Weiner and/or WBC refused to allow an inspection of Station WOZW(AM), Monticello, Maine, on May 3, 1984, by an authorized representative, in violation of Section 73.1225 of the Commission's Rules;
- (c) To determine whether Weiner and or WBC failed to comply with the then prevailing main studio location requirements of Section 73.1125 of the Commission's Rules.
- (d) To determine whether Weiner and/or WBC operated Remote Pickup Base Station KPF-941, Yonkers, New York, to broadcast directly to the public on 1622 kHz, in violation of the permitted uses for remote pickup base stations as stated in then-prevailing provisions of Section 74.431(e), 74.43(g), 74.432(c)(2), 74.432(c)(5), and 74.432(g), of the Commission's Rules.
- (e) To determine whether Weiner and/or WBC misrepresented to the Commission that the transmitter to be used for Remote Pickup Station KPF-941, Yonkers, New York, would comply with the then-prevailing type acceptance criteria of Section 74.451(a) of the Commission's Rules.

(f) To determine whether Weiner, from on or about July 23, 1987, to on or about July 28, 1987, aboard a vessel in international waters and without a license engaged in operating broadcast stations the transmissions of which were received in the United States in violation of Article 30, Section 1(1), Section 2665, of the Radio Regulations of the International Telecommunications Union of the United Nations.

(g) To determine, based on the evidence adduced pursuant to the foregoing issues, whether Weiner and/or WBC possess(es) the requisite character qualifications to be a Commission licensee;

(h) To determine, based on the evidence adduced pursuant to the foregoing issues, whether the application should be granted.

We do not here address Issues (b) and (c), not because these are unimportant, but because these are surely not decisional in this case. See 47 CFR § 1.277(a).

<sup>2</sup> The *I.D.* informs *in extenso* (at paras. 51-52):

The "Principality of Sealand" is a small former British gunnery platform located off the coast of England. Tr. 112. Built in the early part of 1942, its purpose was to defend the Thames Estuary against German attacks on shipping lanes. In 1967, a group directed by Roy Bates, a United Kingdom citizen, established themselves on the fort to run an illegal radio station. Subsequently, Bates declared the fort to be a sovereign principality with himself and his wife as titular heads. MM Ex. 19. Sealand agreed to register the *Sarah* in exchange for free advertising time. Tr. 112-113.

\* \* \*

The United Kingdom does not recognize Sealand as a sovereign nation and has never abandoned title to the fort. The territorial Sea Act of 1987, extended the United Kingdom's territorial jurisdiction to encompass the fort. The United Kingdom does not recognize the right of Sealand to register ships. MM Ex. 19. The United States also does not recognize Sealand registry of vessels. MM Ex. 20. Prior to registering the *Sarah* with Sealand, Weiner made no investigation to determine whether the United States recognized Sealand's registry of vessels. Tr. 115.

<sup>3</sup> WBC Exceptions at 1.

<sup>4</sup> *Id.*, at 2. Paragraphs 7-14 of the *I.D.* narrate Weiner's activities in the early 1970's when Weiner was a teenager. Paragraphs 50-60 of the *I.D.* narrate activities of the *Sarah* occurring after August 1988. WBC does not dispute any of the factual findings; its argument here is wholly procedural. We will disregard the findings, and the conclusions based thereon, stemming from the matter set out in paras. 7-14. See *Character Policy Statement, infra*, 102 FCC 2d at 1229 (violations more than 10 years old not considered); cf. *Tri-State Communications*, 5 FCC Rcd 1156, 1171-72 (Rev. Bd. 1989)(subsequent history omitted). As to the matter discussed in paras. 50-60, we note that WBC does not dispute the facts or deny Weiner's testimony. To the extent that Weiner here seeks to argue his reliability and contrition, we find his testimony relevant, *especially* if we accept WBC's ar-

gument that the record should focus on violations only up to August 1988. His own testimony about his conduct *thereafter* certainly then bears on his pleas for leniency.

<sup>5</sup> Section 502 of the Communications Act reads (emphasis added):

Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by an international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than \$500 for each and every day during which such offense occurs.

The forfeiture plainly is not exclusive.

<sup>6</sup> Only in passing do we touch WBC's reference to *KQED, Inc.*, 5 FCC Rcd 1784 (1990)(subsequent history omitted), and his assertion that his "loss" of the Maine Broadcast stations is a "heavy price" already paid. Weiner did not "lose" those stations to an FCC revocation: he elected to switch rather than fight, *sell* the stations, and *purchase* a "pirate" vessel. WBC's identification with KQED (Exceptions at 9. n.9) is a measure of its distance from an appreciation of law and ordinary concepts of equity. See also *id.*, at n.1 (WBC observes that "1622 kHz. is not allotted for AM transmission . . . [and the] vehemence of the Commission's condemnation . . . appears to correlate with its discomfiture" at not having allocated this particular channel to conventional broadcasting).

<sup>7</sup> The Board is keenly cognizant that the Commission may not be arbitrary in its treatment of applicants with a tarnished past. *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)(producers of rigged network game shows treated differently from network). But *Melody Music* is not on point, since that applicant's prior conduct involved no violation whatever of law or established policy; and the other cases relied upon by WBC contain no glaring pattern of persistent misconduct of the magnitude admitted by Weiner.

<sup>8</sup> *Star Stations of Indiana, Inc.*, 51 FCC 2d 97 (1975), *aff'd per judgment*, 527 F.2d 853 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 992 (1976).

<sup>9</sup> The trail of *L.D.S. Enterprises* appears to go cold after that 1981 opportunity was afforded, and there is no record that its principal (Don W. Burden) was ever permitted to control another broadcast license.

<sup>10</sup> The *I.D.* (at para. 61) also reports:

Weiner also submits a statement from Thomas S. Kneitel, Editor of *Popular Communications*, which publishes dates and times when pirate radio stations throughout the world can be picked up and received. Tr. 136. Weiner is a subscriber to the magazine. Tr. 126. Kneitel states that he has known Weiner professionally and personally for several years and that he has found Weiner "to be a thoroughly responsible and upstanding member of the community, and a person of excellent character." Kneitel believes that "Weiner would be a credit to the broadcasting community and to the Federal Communications Commission."

We are uncertain that Kneitel's fulsome endorsement is entitled to much heft, considering his apparent boosting to "pirate radio stations." *See also id.*, para. 50. We also note that, while Weiner relies upon his ABC record as evidence of rehabilitation, it was *after* he started at the network (i.e., May 14, 1988) that his chicanery recommenced. *See supra* paras. 5-6. In any event, we affirm the *I.D.*'s denial for the reasons explained in our text.

<sup>11</sup> WBC Exceptions at 10. Of course, the Commission has *volumes* of rules, regulations and exotic policies above and beyond the bare requirement of a transmitting license.