



Federal Communications Commission
Washington, D.C. 20554

June 4, 2012

DA 12-871

In Reply Refer to:

1800B3-SS

Released: June 4, 2012

Mr. Otoniel Cruz Rivera
Court-Appointed Bailee for A Radio Company, Inc.
HC-72 Box 3766
PMB-146
Naranjito, PR 00719

A Radio Company, Inc.
c/o Audrey P. Rasmussen, Esq.
Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.
1120 20th St., N.W., Suite 700, North Bldg.
Washington, DC 20036

Mr. Carmelo Santiago Roman
c/o Davina S. Sashkin, Esq.
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209

In re: WEGA(AM), Vega Baja, Puerto Rico
Facility ID No. 69853
File No. BAL-20120106AAD

Application for Assignment of License

Petition to Deny

Dear Counsel and Mr. Cruz Rivera:

We have before us the referenced application (the "Application") for Commission consent to the involuntary assignment of the license of Station WEGA(AM), Vega Baja, Puerto Rico (the "Station"), from A Radio Company, Inc. ("A Radio") to Carmelo Santiago Roman ("Roman"), President and 100 per cent owner of VI/MAN Broadcasting System Corp. ("VI/MAN"). We also have before us a Petition to Deny the Application (the "Petition"), filed by A Radio on February 9, 2012.¹ For the reasons stated below, we dismiss the Application as patently defective.²

Background. The Application arises out of a Puerto Rico court-ordered judgment against the licensee, A Radio. To satisfy the judgment, in October 2011, the Free Associated State of Puerto Rico Court of First Instance Court of Bayamon (the "Court") issued an "Order" and "Writ of Attachment of

¹ Roman filed an Opposition to the Petition on February 23, 2012, to which A Radio replied on March 6, 2012.

² See 47 C.F.R. § 73.3566.

Personal Property” (“Order and Writ”)³ directing that A Radio’s personal property – cash, goods in the possession of third parties, bank accounts, stocks, motor vehicles, income from the rental of the Station, the Station’s license, commissions, and other funds in sufficient amounts to satisfy a judgment in the sum of \$172,000 – be attached and delivered to Otoniel Cruz Rivera, as court-appointed “bailee” (“Rivera”) pending a final court order.⁴

On January 19, 2012, A Radio filed a motion with the Court seeking relief from the Order and Writ. On February 6, 2012, the Court granted a stay in the proceedings until mid-March 2012 to allow VI/MAN to respond to A Radio’s allegations.⁵ To our knowledge, the motion remains pending.

On February 9, 2012, A Radio filed the Petition, raising several arguments in opposition to the assignment of the Station’s license to Roman. First, A Radio questions the validity of the Application in light of the fact that the Order and Writ captions VI/MAN as a party to the proceeding while the Application captions Roman as Assignee.⁶ Next, A Radio argues that the Application is premature and should be dismissed because the Order and Writ is still being contested in the Court.⁷ Finally, A Radio asserts that its dispute with VI/MAN and Roman is a private contractual matter properly before the Court in Puerto Rico and that the “FCC lacks jurisdiction to decide the underlying dispute.”⁸

In Opposition, Roman argues that the Application correctly lists him as “Assignee” because as president and 100 per cent owner of VI/MAN, he “has full authority regarding the disposition of company assets.”⁹ Roman contends that the Commission should reject the Petition or “hold deliberation of the Petition in abeyance pending the outcome of the court proceedings.”¹⁰ In Reply, A Radio argues that due to the stay issued by the Court, the Application must be dismissed because “an applicant cannot file an application [for assignment] on the possibility of success in a local court.”¹¹

Discussion. The Commission’s long-standing policy is to accommodate the actions of state courts, thereby avoiding conflicts between state and federal authority, unless a public interest determination under the Act would compel a different result.¹² Indeed, the U.S. Supreme Court has stated that “the principle of fair accommodation between State and Federal authority . . . *should* be observed” if the state’s laws “can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest” which underlies licensing decisions.¹³ The Commission thus defers to judicial determinations in many areas, including bankruptcy matters, private disputes, and the

³ See *VI/MAN Broadcasting System Corp. v. A Radio Company, Inc.*, Order and Writ of Attachment, Civil Number: D CD2010-3426 (rel. Oct. 19, 2011), submitted as Attachment 6 to the Application.

⁴ See *id.*; see also Petition at 2.

⁵ See *VI/MAN Broadcasting System Corp. v. A Radio Company, Inc.*, Notification, Civil Number: D CD2010-3426 (rel. Feb. 22, 2012); see also Reply at 2. We have received no further information on the status of the Court proceeding.

⁶ Petition at 2.

⁷ *Id.* at 3.

⁸ *Id.* at 4.

⁹ Opposition at 1-2.

¹⁰ *Id.* at 2.

¹¹ Reply at 2.

¹² *Radio Station WOW v. Johnson*, 326 US 120, (1945) (“*Radio Station WOW*”); *Arecibo Radio Corporation*, Memorandum Opinion and Order, 101 FCC 2d 545 (1985) (“*Arecibo Radio*”).

¹³ *Radio Station WOW*, 326 US at 132.

interpretation and enforcement of contracts for the sale of a broadcast station. The Commission, however, retains exclusive authority to license broadcast stations,¹⁴ and when a state court's decision is contrary to Commission policy, the Commission is neither bound by the state court order nor need take action to allow the order to be carried out.¹⁵

It is well established that a broadcast license does not confer a property right, but rather is a valuable privilege to utilize the airwaves.¹⁶ As the Commission has stated, "[t]he extraordinary notion that a station license issued by this Commission is a mortgageable chattel in the ordinary commercial sense is untenable."¹⁷ Rather the Commission has repeatedly observed that a "license, as distinguished from a station's physical assets, is not subject to a mortgage, security interest, or lien, pledge, *attachment*, seizure, or similar property right."¹⁸ Moreover, broadcast licenses are subject to certain limitations, including the statutory requirement to obtain the Commission's prior consent to a proposed assignment or transfer.

Here, the Order and Writ is facially inconsistent with the Commission's policy prohibiting attachment of a station license. Indeed, the Order and Writ specifically directs the attachment of the Station's license.¹⁹ In these circumstances, the Commission's general deference to state court orders is not warranted. We find that the Court's attachment of the Station's license exceeded its authority and to this extent the Order and Writ is void *ab initio* as violative of the Act and Commission policy.²⁰

We also note that the Application here is filed as a "short form" application (filed on FCC Form 316), which is reserved for certain involuntary or *pro forma* assignments and transfers. In cases of bankruptcy or receivership, the Commission permits trustees or receivers to hold licenses on a temporary basis pending disposition of station assets,²¹ and the Commission specifically authorizes the use of FCC Form 316 in those contexts.²² In this case, the Order and Writ appoints Rivera as "bailee" of the attached

¹⁴ See, e.g., *Arecibo Radio*, 101 FCC 2d at 549 (honoring court order requiring licensee to execute assignment application in favor of another party).

¹⁵ See, e.g., *Kirk Merkley*, Memorandum Opinion and Order, 94 FCC 2d 829 (1983) ("*Merkley I*"), *recon. denied*, 56 RR 2d 413 (1984) ("*Merkley II*"), *aff'd sub nom. Merkley v. FCC*, 776 F.2d 365 (1985) (declining to recognize court order based on contract with a prohibited reversionary interest that was tantamount to a vested security interest in a license).

¹⁶ See 47 U.S.C. § 310(d).

¹⁷ *Radio KDAN*, Memorandum Opinion and Order, 11 FCC 2d 934, n.1, *recon denied*, 13 RR 2d 100 (1968), *aff'd on procedural grounds sub nom. W.H.Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969).

¹⁸ *Merkley II*, 56 RR 2d at 416 (emphasis added).

¹⁹ See Writ at 1.

²⁰ See, e.g., *Gresham Communications, Inc., and Charles W. Cherry, II, Receiver for Gresham Communications Inc., and Caswell Capital Partners, LLC, Assignee*, Memorandum Opinion and Order, 26 FCC Rcd 11895, 11900 (2011) (Commission affirms staff finding that state court action attaching and ordering sold a broadcast license declared void *ab initio*).

²¹ See, e.g., *O.D.T. International*, Memorandum Opinion and Order, 9 FCC Rcd 2575, 2576 (1994); and *Arecibo Radio*, 101 FCC 2d at 550-551.

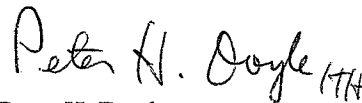
²² See FCC Form 316, General Instruction A.8. (authorizing use of Form 316 where "[t]here is an involuntary assignment or transfer of a controlling interest in a licensee/permittee to a **court-appointed** federal trustee (in bankruptcy proceedings) or receiver (in state court receivership proceedings) (emphasis in original). See also, e.g., *Caswell Capital Partners, LLC*, Letter, 24 FCC Rcd 2894 (MB 2009) ("*Caswell*"). In *Caswell*, we approved a Form 316 application for involuntary transfer of control of a broadcast station pursuant to a court's order appointing a Receiver "to conserve the business and assets of the Station until a sale of the Station's assets is confirmed and a purchaser is found for the Station acceptable to the Receiver, and the FCC has granted its consent for transfer of the (continued . . .)

property "under the control of the plaintiff [VI/MAN],"²³ and the Application specifies A Radio as Assignor and Roman as Assignee. A proposed transaction that, as here, involves a "substantial change in ownership or control" must be filed on either an FCC Form 314 or 315, as appropriate,²⁴ and subject to the petition to deny procedure set forth in Section 310(d) of the Act.²⁵ Therefore, we find that the Application was submitted on an incorrect FCC form and for this reason, too, it must be dismissed.

Conclusions/Actions. Accordingly, for the reasons set forth above, IT IS ORDERED, that the Application (File No. BAL-20120106AAD) for consent to assign the license of Station WEGA(AM), Vega Baja, Puerto Rico, from A Radio Company, Inc., to Carmelo Santiago Roman, IS DISMISSED as patently defective pursuant to 47 C.F.R. § 73.3566.

IT IS FURTHER ORDERED, that the February 9, 2012, Petition to Deny filed by A Radio Company, Inc., IS DISMISSED AS MOOT.

Sincerely,

A handwritten signature in black ink that reads "Peter H. Doyle" followed by a stylized monogram "TH".

Peter H. Doyle
Chief, Audio Division
Media Bureau

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FCC license to such purchaser." 24 FCC Rcd at 2898. In doing so, we specifically noted, "[a]fter a purchaser (or purchasers) is found acceptable to Receiver and the FCC, Receiver is directed to make all necessary applications with the FCC in order to effect the proper transfer or assignment of the licenses, together with such further assets as the Receiver should deem appropriate, to such purchaser." *Id.* at n.39.

²³ See Order at 1.

²⁴ See Form 316, General Instructions A.9 ("This form **does not** cover assignments or transfers from an executor/administrator or other court-appointed officer to the ultimate beneficiary **or** assignments or transfers from a trustee or receiver to an ultimate third-party purchaser. Those transactions must be filed on either FCC Form 314 or 315, as appropriate." (emphasis in original)).

²⁵ See 47 U.S.C. §§ 310(d) and 309(b) and (c).