

ORIGINAL

Before the
Federal Communications Commission

Washington, D.C. 20554

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In the Matter of)
)
Petitions for Declaratory Ruling)
Regarding Reversionary and)
Security Interests)

Federal Communications Commission
Office of the Secretary

MMB File No. 910221A
MMB File No. 870921A

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters ("NAB")^{1/} submits these comments on the Petition for Declaratory Ruling filed by Hogan & Hartson and the Motion for Declaratory Ruling filed by Crowell & Moring (hereinafter collectively referred to as the "Petitions"). The Petitions ask the Commission for a determination that the grant of a security interest in a broadcast license to a lender or the retention of a reversionary interest in a license by a licensee providing financing for the purchase of its station are consistent with the Communications Act.

The gravamen of the Petitions is a belief that expanding the rights of those who provide financing for broadcast acquisitions will increase the amount of funds available to prospective station purchasers, and therefore improve the market for

^{1/} NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and all the major networks.

broadcast properties. NAB is aware of no specific evidence supporting this viewpoint; it is, however, logical to believe that providing lenders increased assurance that their investment will not be lost may lead to some greater willingness to make loans to purchase broadcast stations.

The Petitions present a number of issues of far-reaching implications for broadcast licensing and the operation of the Communications Act. If the Commission is inclined to act favorably on either or both of the Petitions, NAB urges the Commission to undertake a full rulemaking proceeding so that a wide range of viewpoints can be considered and a full range of policy alternatives explored before any action is taken which may have unintended consequences. The relative paucity of comments received on the Petitions, despite the importance of these issues, strongly suggests that further proceedings would be appropriate, rather than action by the Commission on the basis of two requests for declaratory rulings.

In evaluating the Petitions, the Commission should keep in mind several policies stemming from the Communications Act. Most importantly, the Act expressly prohibits anyone from obtaining a property right in the use of the radio spectrum beyond that specifically granted in the license. *See FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940). It is essential that any forms of security interest approved by the Commission be conditioned on a clear acknowledgement that the lender obtains no rights in the license or the spectrum used against the Commission or the interests of the public. If that is made clear, a

strong case might be made that some arrangements which permit lenders to obtain a priority claim on the value represented by a broadcast license would not inherently violate the Communications Act.^{2/}

The Commission and the courts have recognized that licensees obtain some form of property interest in their licenses, and that even the government cannot deprive them of that interest without due process. *See L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 798 (D.C. Cir. 1948) ("A broadcasting license is a thing of value to the person to whom it is issued . . ."). Indeed, even an *applicant* for a license obtains a property interest, so that its application cannot be denied without proper procedures. *See, e.g., Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); *Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519 (D.C. Cir.), *cert. denied*, 469 U.S. 1017 (1984). The value which a broadcaster has in its license in most cases represents the majority of the worth of a station. Permitting a licensee to use the property right it obtains in its license as security for the financing needed to purchase or construct its station may not in itself create any prohibited property interest in the license or the spectrum.

Moreover, the Commission already permits lenders to retain security interests in licensees which have effects not substantially different from those proposed in the Petitions. The Commission allows corporate licensees to pledge their stock

^{2/} NAB is concerned that actions by the Commission which have the effect of treating broadcast licenses more like ordinary property rights might result in increased temptation by federal or local tax authorities to seek power to impose taxes or fees on the license itself.

to lenders subject to a requirement of Commission approval prior to any disposition of that stock becoming effective. In practical terms, this permits the lender to sell a defaulting corporate licensee for the going business value of the station, including the value represented by the license.

As a general matter, the public interest is served by Commission actions which stimulate the availability of financing for broadcast stations. Broadcasters who wish to leave the business will not serve their audience as well as a new owner committed to building up a station. If financing is difficult or impossible to obtain, existing owners may be forced to remain in place longer than they would desire. Moreover, the ready availability of financing makes it easier for stations to improve their facilities; indeed, the prospect of the capital investments which may be needed for conversion to DAB or HDTV operations increases the need for the Commission to be concerned about maintaining an environment conducive to capital formation for broadcasters.

At the same time, the Commission should consider whether recognition of expanded security interests in broadcast licenses might harm the public interest by hindering efforts at renegotiation or "workouts" of loans to broadcasters which face a temporary financial crisis. Under the present situation, prudent lenders recognize the necessity to work with an existing licensee in order to maximize the value which the lender, as well as the licensee, can obtain from the station. The public benefits from renewed or increased efforts at better broadcast service, as well as from the fact that fewer stations are subjected to sudden changes in

control with the possibility of repeated further changes during the course of receivership or bankruptcy proceedings. If lenders were able to proceed directly against the broadcast license, their incentive to work with a broadcaster facing a cash flow problem may decrease, leading to increased chaotic transfers and diminished public service.

The Commission should also fully examine and consider any proposal which might weaken licensees' abilities to control their own stations or which might create situations leading to unauthorized transfers of control or effective control of stations by unapproved persons. Even if prior Commission approval would be required before a creditor could take control of a station or force its sale, creditors who have a direct security interest in a license may be tempted to exercise greater control over a borrower station than lenders would presently contemplate, to the detriment of the independent judgment of the licensee. Taken to an extreme, creditors might effectively obtain control over a station without Commission consent. Such creditors may never have had their qualifications reviewed by the Commission.^{3/} Any regulations adopted by the Commission should establish without doubt that exercise of control over a licensee by a creditor in the absence of FCC consent would violate the Commission's rules.

^{3/} To this extent, there appear to be substantial reasons to consider the reversionary interest proposed by Crowell & Moring. If an existing broadcaster retains a reversionary interest in a station being sold, the creditor at least has already been approved by the Commission and is familiar with the obligations of licensees and the Commission's rules.

In particular, NAB is concerned about proposals, such as the one presented by GE Capital Corporation, which would permit a creditor to apply for Commission consent to an assignment of a license to a creditor using FCC Form 316 based on the creditor's assertion that the licensee is in default on its loan. The threat of such an action would obviously give creditors a potent weapon to force changes on unwilling licensees. Moreover, it would involve the Commission in difficult and perhaps lengthy disputes over questions of default and rights under loan agreements which must be interpreted under state law. One can foresee a licensee objecting to a lender-filed assignment application on the ground that the station is not in default, or that the steps taken by the lender are not available under the loan agreement or under applicable state or federal laws. The Commission has neither the resources nor the expertise to adjudicate individual disputes concerning compliance with loan agreements. By contrast, under present practice, the Commission will only act on a short form transfer application after a state or federal court has acted to change control over the broadcast station.

Conclusion

For the foregoing reasons, NAB urges the Commission to proceed cautiously in reassessing the interests which prior licensees and lenders can reserve in a broadcast license. The questions are certainly of such significance that they should be addressed, if the Commission intends to change its policies, in a full rulemaking proceeding. While the Commission should act to promote the availability of financing for broadcast stations, it should be careful to do so in a

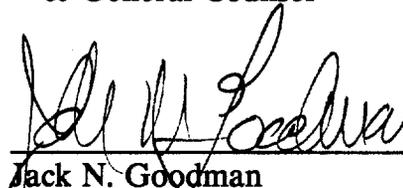
manner which is not only consistent with the Communications Act, but also with longstanding FCC policies intended to ensure licensee independence.

Respectfully submitted,

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