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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	MM DOCKET NO. 93-135
)	
THE PETROLEUM V. NASBY)	
CORPORATION)	File No. BRH-890601VB
)	
For Renewal of License)	
of Station WSWR(FM),)	
Shelby, Ohio)	
)	
THE PETROLEUM V. NASBY)	
CORPORATION)	File Nos. BTCH-921019HX
)	and BTCH-921019HY
)	
For Transfer of Control)	
of Station WSWR(FM),)	
Shelby, Ohio)	

To: The Review Board

MASS MEDIA BUREAU'S EXCEPTIONS

Respectfully submitted,
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Summary

1. The Petroleum v. Nasby Corporation ("Nasby") is not qualified to remain a Commission licensee, and the ID erred in concluding otherwise. The above-captioned renewal and transfer applications should be denied. In 1992, Thomas L. Root, Nasby's controlling principal, was adjudged guilty of numerous felonies, most of which involved fraud, and occurred in the context of application licensing proceedings before the Commission. The federal proceeding involved the forging of an order of a Commission Administrative Law Judge, and the submission in a Commission proceeding of a counterfeit Federal Aviation Administration "No Hazard" determination.

2. The ID erred in shielding the licensee on grounds that the corporation itself did not engage in the misconduct. The cases relied upon in the ID are inapposite because they were based on findings that the misconduct did not involve broadcasting or Commission applications, both of which are clearly involved here. Moreover, the ID impermissibly distinguishes between guilty and innocent principals, contrary to Commission precedent. Finally, the ID erred in minimizing Root's involvement in the licensee.

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MASS MEDIA BUREAU'S EXCEPTIONS

Preliminary Statement

2. The Mass Media Bureau, pursuant to Sections 1.276 and 1.277 of the Commission's Rules, hereby submits its exceptions to the Initial Decision of Administrative Law Judge Edward Luton, 9 FCC Rcd ____ (released October 20, 1994) ("ID").

Statement of the Case

3. By Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 8 FCC Rcd 4035 (1993), the Commission designated the above-captioned applications for hearing in a consolidated proceeding upon the following issues:

1. To determine the effect of Thomas L. Root's federal and state convictions on the basic qualifications of The Petroleum V. Nasby Corporation.

2. To determine, pursuant to Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules, whether Thomas L. Root and Kathy G. Root engaged in the unauthorized transfer of control of The Petroleum V. Nasby Corporation.

3. To determine, in light of the evidence adduced pursuant to the above issues, whether grant of the renewal application of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.

4. To determine, in light of the foregoing, whether approval of the pending applications seeking to transfer control of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.

4. The ID granted the renewal application of The Petroleum V. Nasby Corporation ("Nasby") as well as the above-captioned transfer of control applications. The ID imposed a \$4,000 forfeiture for repeated violations of Section 310(d) of the Communications Act, as amended, and Section 73.3540 of the Commission's Rules.

Questions Presented

Whether the ID erred in concluding that Nasby is qualified to remain a Commission licensee despite the criminal convictions of its principal, Thomas L. Root.

Argument

The ID erred in concluding that Nasby is qualified to remain a Commission licensee despite the criminal convictions of its principal, Thomas L. Root.

5. The facts in the instant case are not in dispute. Before he transferred all of his shares in Nasby to his parents, Thomas L. Root owned between 15.6% and 44% of Nasby individually. He was one of three directors and Nasby's corporate secretary. In 1992, Root was adjudged guilty of numerous felonies in federal court and in courts in North Carolina and Florida. Most of these felonies involved fraud, which occurred in the context of application licensing proceedings before the Commission. The federal proceeding involved the forging of an order of a Commission Administrative Law Judge, and the submission in a Commission

proceeding of a counterfeit Federal Aviation Administration "No Hazard" determination. Thus, the misconduct was willful, frequent, current and serious. Moreover, it was directly related to the Commission's licensing activities. Notwithstanding these facts, the ID declined to disqualify Nasby. We submit that the ID erred in this regard.

6. Initially, the ID relies on the conclusion that Nasby, the corporation, has not been adjudged guilty of any misconduct. In effect, the ID would find any corporation qualified without regard to the misconduct of its principals. This kind of shielding of a licensee on the sole basis of corporate structure is without Commission precedent. Indeed, the ID does not cite any authority in support of such a proposition. In our view, this theory, if allowed to stand, would make a mockery of the Commission's character requirements, for all a wrongdoer would have to do would be to create a corporation to evade any adverse finding with regard to the wrongdoer's conduct. Moreover, the conduct of the principals of a licensee corporation is the best indicator of a licensee's propensity to deal truthfully and honestly with the Commission.

7. In support of its conclusions that Nasby possesses the character qualifications to remain a Commission licensee, the ID cites Sande Broadcasting Co., Inc., 61 FCC 2d 305 (1976); and Chapman Radio and Television, Co., 57 FCC 2d 76 (1975), modified on

other grounds, 45 RR 2d 239 (1979). However, in both Sande and Chapman the Commission considered it significant that the misconduct engaged in by the principals did not involve broadcasting or any application before the Commission. See also, Chapman Radio and Television, Co., 47 FCC 2d 775 (Rev. Bd. 1974). Here, as the ID acknowledges, at para. 25, Thomas L. Root's misconduct involved applications which he filed with the Commission on behalf of many applicants associated with Sonrise Management Services. Indeed, one of the criminal counts of which Root was convicted involved the forging of a counterfeit Order of a Commission Administrative Law Judge in connection with a broadcast application. Nevertheless, the ID persists in shielding Nasby from the misconduct of its controlling principal because the Commission-related misconduct did not directly involve any Nasby application. We submit that this distinction is completely artificial. The criminal conduct at issue here was the conduct of Nasby's principal and there is no logical reason to whitewash the misconduct merely because it did not involve an application with Nasby's name on it.

8. In concluding that Nasby should not be disqualified because Nasby "had nothing to do with Root's conduct," at para 25, the ID attempts to distinguish West Jersey Broadcasting Co., 90 FCC 2d 363 (Rev. Bd. 1982). West Jersey held, at 371, that the Commission will not "atomize a licensee into its molecular elements for a gratuitous adjudication on the discrete qualifications . . . of individual shareholders." We submit that West Jersey controls,

and that the Commission does not, indeed, distinguish between guilty and innocent principals. Contrary to the suggestion in the ID, Sande and Chapman do not hold otherwise.

9. Finally, at para. 27, the ID concludes that Root's participation in Nasby "was not so pervasive as to implicate the Commission's concern" We disagree. For example, Thomas L. Root reviewed many matters ostensibly as the station's attorney. In Lorain Journal Company v. FCC, 351 F. 2d 824 (D.C. Cir. 1965), who selected the attorney was deemed relevant. Here the owner was the attorney. Here, in addition, as in Lorain Journal, Root had the authority to sign checks and he kept the corporate books.

10. Root reviewed a station contract for the provision of programming by the Satellite Music Network. Root was one of three members of the Board, and the Board determined when financing was needed and what to pay the general manager. Evidence in the record suggests that Root attended and voted at all Board meetings. Root signed loan documents and provided personal guarantees and he once advanced Nasby \$40,000 to satisfy the Internal Revenue Service. Root handled the filing of ownership reports and prepared and filed the station's first renewal application. Even after he had resigned, Root assisted the station in filing an ownership report.

Nasby Exs. 1 and 2; Tr. 59, 61, 66-67, 69, 84.

11. While conceding most of these facts, the ID concludes that Root did not have day-to-day involvement in the operations of the station. This conclusion is not justified. In any case, even when day-to-day operations of a station are delegated to an agent or employee, control can vest elsewhere. David A. Davila, 6 FCC Rcd 2897, 2899 (1991). Moreover, the Commission has refused to insulate from its character requirements even persons whose ownership interests are not attributable. Marr Broadcasting Company, Inc., 2 FCC Rcd 6596 (1987).

12. Furthermore, the ID erroneously relies on the fact that Root purportedly resigned from Nasby before his convictions. It cannot be denied that the perpetrator of the conduct was, at the time of the conduct, in control of the largest single block of Nasby stock. Moreover, the misconduct clearly took place while Root was a Nasby principal. To conclude that an applicant should not be disqualified merely because its principal resigned just before being convicted would wreak havoc with the Commission's character requirements. See TV 9, Inc. v. FCC, 495 F. 2d 929, 939-40 (D.C. Cir. 1973).

Conclusion

13. In sum, Nasby is not qualified to remain a Commission licensee, and the ID erred in concluding otherwise. The above-captioned renewal and transfer applications should be denied.

Respectfully submitted,
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November 21, 1994

CERTIFICATE OF SERVICE

I, Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has, on this 21st day of November, 1994, sent by regular United States mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Exceptions" to:

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