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April 3, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

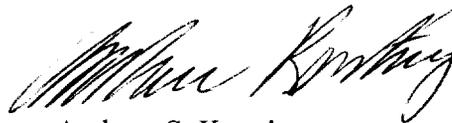
Re: MM Docket No. 97-122
Fort Lee, New Jersey
Pomona, New York
Monticello, New York

Dear Ms. Salas:

Transmitted herewith on behalf of Monticello Mountaintop Broadcasting, Inc., is an original and six copies of its "Reply Findings" in the above-reference proceeding.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting
Counsel for Monticello
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Enclosures

cc (w/ encl.): The Honorable Arthur I. Steinberg, Administrative Law Judge (by hand)
Alan Aronowitz, Esquire (by hand)
Charles R. Naftalin, Esquire (by mail)
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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In Re:)	
)	
GERARD A. TURRO)	MM Docket No. 97-122
)	
For Renewal of License)	File Nos. BRFT-970129YC
for FM Translator Stations)	BRFT-970129YD
W276AQ(FM), Fort Lee, New Jersey,)	
and W232AL(FM), Pomona, New York)	
)	
MONTICELLO MOUNTAINTOP)	
BROADCASTING, INC.)	
)	
Order to Show Cause Why the)	
Construction Permit for FM Radio)	
Station WJUX(FM), Monticello, New York,)	
Should Not Be Revoked)	
)	
To: The Honorable Arthur I. Steinberg		
Administrative Law Judge		

REPLY FINDINGS OF
MONTICELLO MOUNTAINTOP BROADCASTING, INC.

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April 3, 1998

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SUMMARY

As demonstrated in these Reply Findings, as well as in Monticello Mountaintop Broadcasting, Inc.'s ("MMBI") Proposed Findings of Fact and Conclusions of Law, filed March 13, 1998, the Mass Media Bureau ("Bureau") has failed to meet its burden of proof with respect to the issues which have been designated against MMBI in this proceeding. Because Issues 5-8 must be resolved in MMBI's favor, MMBI respectfully submits that a grant of its pending license application now is warranted.

The Bureau failed to establish that MMBI has violated Sections 73.1120 and 73.1125(a) and (c) of the Commission's rules with respect to maintaining a main studio for Station WJUX. The record demonstrates that MMBI has been able to originate programming from its main studio since it commenced operation, and has otherwise maintained its main studio facility in a manner that complies with the Commission's rules. Moreover, MMBI's employment of Gene Blabey and Carol Montana as General Manager and Public Affairs Director, respectively, satisfies the Commission's requirement of maintaining a "meaningful management and staff presence."

The Bureau also failed to establish that MMBI has engaged in an unauthorized transfer of control of Station WJUX in violation of Section 310(d) of the Communications Act and Section 73.3540 of the Commission's rules. The evidence reflects that MMBI has always retained ultimate decision-making authority over WJUX by exercising control over its finances, programming, and personnel. The record also establishes that MMBI is prepared to operate independently of Jukebox Radio at any time it believes the programming arrangement between the two entities does not fulfill its public interest obligations. Nevertheless, assuming, *arguendo*, the Presiding Judge were to find that MMBI abdicated control of WJUX, MMBI relied in good faith on the Bureau's November 19,

1991, declaratory ruling, which Wesley Weis believed expressly authorized the programming arrangement between WJUX and Jukebox Radio. Therefore, revocation of the WJUX construction permit is not warranted, nor should any forfeiture be assessed against MMBI.

Finally, the Bureau failed to establish that MMBI has misrepresented facts and/or lacked candor in this proceeding. The Bureau's analysis (as well as that of Universal Broadcasting of New York, Inc.) of the misrepresentation issue is based solely upon the same facts, and is wholly dependent upon, its analysis of the main studio and transfer of control issues. The Bureau contends that MMBI failed to maintain a properly equipped and staffed main studio, and that MMBI engaged in an unauthorized transfer of control of WJUX. Because MMBI has consistently maintained that its main studio complies with the Commission's rules and that it has not abdicated control of WJUX, the Bureau claims that MMBI's representations concerning the operation of WJUX constitute misrepresentation and/or lacked candor. The Bureau's position is inherently flawed, however, because even assuming, *arguendo*, that the Presiding Judge may find against MMBI on the main studio and/or transfer of control issues, that does not mean that MMBI necessarily lacked candor or misrepresented the underlying facts regarding the operation of WJUX. Indeed, there is no evidence that MMBI ever intended to deceive the Commission with respect to any matter concerning the operation of WJUX.

As demonstrated above, Issues 5, 6, and 7 all should be resolved in MMBI's favor. Therefore, Issue 8 also should be resolved in the permittee's favor because MMBI possesses the requisite character qualifications to be a Commission licensee.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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Should Not Be Revoked)	
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To: The Honorable Arthur I. Steinberg		
Administrative Law Judge		

REPLY FINDINGS OF MONTICELLO MOUNTAINTOP BROADCASTING, INC.

Monticello Mountaintop Broadcasting, Inc. ("MMBI"), by counsel, hereby submits its Reply Findings of Fact and Conclusions of Law in the above-captioned proceeding. In reply, the following is stated:¹

¹ The Mass Media Bureau and Universal Broadcasting of New York, Inc., filed a combined 153 pages of proposed findings and conclusions. Some of the proposed findings have record support, some to a greater or lesser extent distort the record, and some are utterly contrary to, or altogether without any reference to, the record. For example, paragraph 49 of the Bureau's Findings cites Tr. 1406 for a fact not even related to the testimony on that page. Paragraph 50 of the Bureau's Findings cites Tr. 1342 for a claim that Gerard Turro participated in discussions, although the question whether he did so is not asked or answered there. It is not feasible to deal

(continued...)

I. The Bureau Has Failed to Establish that MMBI Violated Sections 73.1120 and/or 73.1125(a) and (c) of the Commission's Rules With Respect to Maintaining a Main Studio for Station WJUX.

With respect to Issue 5, the Mass Media Bureau ("Bureau") claims that it met its burden of demonstrating violations of Sections 73.1120 and 73.1125(a) and (c) of the rules because, according to the Bureau: (1) Station WJUX serves Bergen County, New Jersey, not Monticello or Sullivan County, New York; (2) WJUX did not have production and transmission facilities until the winter of 1997; (3) WJUX did not have and continues to lack a meaningful management and staff presence; and (4) WJUX had no local telephone between October 1994 and July 1995. Bureau Findings, ¶165.

Nevertheless, neither the Bureau nor Universal Broadcasting of New York, Inc. ("Universal"), has offered evidence of any community need and/or interest in Monticello and/or Sullivan County that has not been addressed by WJUX's programming. Moreover, neither the FCC nor MMBI has received any complaints that WJUX's programming is not serving the needs and interests of the Monticello area. Carol Montana, WJUX's Public Affairs Director, testified that the only listener complaint she received regarding WJUX's programming was that the station did not play enough Perry Como music. Tr. 884-85. Montana stated that she contacted Jukebox Radio concerning the complaint, and the network responded by adding a Perry Como show. *Id.*

The record establishes that WJUX regularly broadcasts public affairs programs and public service announcements of interest to the residents of its service area. Moreover, due to the proximity of Monticello and Sullivan County to the New York City metropolitan area, it is reasonable to infer

¹(...continued)

with each such instance. Accordingly, this Reply does not undertake an exhaustive response to each Bureau and Universal mistake, and the absence of a comment herein or a Bureau or Universal finding that is not well founded in the record does not, obviously, mean that MMBI accepts such finding.

that a program designed to be of interest to the New York City metropolitan area also would be of interest to the residents of Sullivan County. Therefore, the Bureau has failed to establish that WJUX does not serve the needs and interests of its service area, and there is no basis for drawing a conclusion adverse to MMBI pursuant to Section 73.1120 of the Commission's rules. See *WHYY, Inc.*, 93 FCC 2d 1086, 1094 (1983).

The Bureau also claims that WJUX did not have program origination and production facilities until the winter of 1997. Bureau Findings, ¶158. The Bureau further contends that WJUX's General Manager, Gene Blabey, was "unaware of how to originate programming" in April 1995, and did not know how to do so until he prepared for the December 1997 hearing. *Id.* at ¶159. In addition, the Bureau claims that Blabey never tried to use the equipment in the WJUX studio to originate programming, and that neither he nor Montana knew that the WJUX transmitter could be controlled by telephone during the April 1995 inspection. *Id.* As demonstrated below, however, the Bureau's arguments are not supported by the record evidence. Finally, the Bureau's statement in ¶159 that Blabey "was not able to answer correctly Loginow's questions" is preposterous. Blabey correctly answered Loginow's questions. That Loginow reached erroneous conclusions is due to inept questions, lack of follow-up questions, unwarranted assumptions, or a combination of the above.

During Serge Loginow, Jr.'s inspection of the WJUX main studio on April 13, 1995, Blabey informed Loginow that WJUX was able to originate programming from its main studio facility. Tr. 1029. In addition, Blabey told Loginow that the mixing board, microphones, and tape recorders located in WJUX's main studio all worked because the equipment had been used by Stations

WVOS(AM)/(FM).² Tr. 1029-30. Blabey also explained to Loginow how programming could be originated from WJUX's main studio and transmitted to its transmitter. Tr. 1027. Blabey informed Loginow that, in order to originate programming from MMBI's main studio and send it to the transmitter, all he had to do was "throw a switch in the transmitter room," which is about 10-15 feet down the hall from the WJUX studio room.³ Tr. 1027-28.

Montana also testified that, at the time of the April 1995 inspection, WJUX could have originated programming from its main studio without going outside its studio facility. Tr. 892. She testified that to originate programming from the WJUX main studio, one needed only to place the switch in the "up" position, at which point the WJUX main studio would then operate in the same manner as any other radio station. Tr. 897-98. In light of the testimony of Blabey, Montana and Weis, the record does not support the Bureau's allegations that WJUX did not have program origination capability at the time of the April 1995 inspection, or that Blabey did not know how to use such equipment at that time.

The Bureau also contends that neither Blabey nor Montana knew that the WJUX transmitter could be remotely controlled by telephone from the main studio during the 1995 inspection. Bureau Findings, ¶159. The record establishes, however, not only that the WJUX transmitter was capable

² Unless a distinction is otherwise warranted, Stations WVOS(AM)/(FM), Liberty, New York, will be collectively referred to herein as "WVOS."

³ Based on Weis' experience in the design and operation of radio stations, as well as his personal observation of the WJUX studio before the April 1995 inspection, Weis believed that WJUX was fully capable of originating programming from its main studio direct to its transmitter without the need for anyone to go to the transmitter site. MMBI Ex. 1, p. 5. Loginow himself testified that he found the alleged need to go to the WJUX transmitter site (which is located approximately 15 minutes away from the main studio) in order to originate programming was "highly unusual." Tr. 447.

of being controlled from WJUX's main studio by telephone dial-up at the time of the April 1995 inspection, but that both Blabey and Montana were aware of this fact.⁴

Mr. Herman Hurst, MMBI's consulting engineer, who first visited the WJUX main studio on July 6, 1995, confirmed that the WJUX main studio has remote control capability to the main transmitter. MMBI Ex. 2, p. 2. Montana testified that there were no physical changes to the WJUX main studio after the FCC inspection in April 1995. Tr. 892. Gerard Turro also testified that he inspected the WJUX main studio equipment and verified that it was all working at the time WJUX was constructed in October 1994. Tr. 1794-95. Thus, the record is clear that the WJUX transmitter could be remotely controlled by telephone at the time of the 1995 inspection. *See also* MMBI Ex. 1, p. 5.

With respect to Blabey's and Montana's knowledge at the time of the Loginow inspection of the ability to control the WJUX transmitter remotely by telephone, the reasonable inference from Blabey's testimony is that he was at that time fully aware that the WJUX transmitter could be controlled from the main studio by telephone dial-up.⁵ Tr. 965-67. Montana also testified that there was dial-up remote control for the WJUX transmitter from the station's main studio at the time of

⁴ The Bureau's proposed finding (§159) accuses Blabey and Montana, in not so veiled language, of concocting their testimony on this point and on the point of WJUX's program origination capability. The Bureau shows no foundation for that accusation. Both Blabey and Montana, who the Bureau was able to question as adverse witnesses, were cooperative and forthright in their testimony.

⁵ Although Blabey did not inform Loginow of this fact in response to the FCC field inspector's inquiries, Loginow did not ask Blabey whether the WJUX transmitter could be controlled remotely by telephone, but only whether there was a remote control "unit" or "equipment" at the main studio. Tr. 962, 577. Indeed, as demonstrated below, it is highly unlikely that the WVOS Business Manager (Montana) would be aware of the telephone dial-up capability at WJUX's main studio, but that the owner/general manager of WVOS, who also serves as general manager of WJUX, would not be aware of this fact.

the FCC inspection in April 1995, and she knew how to use the remote control telephone line at that time. Tr. 879-80 (*see* MMBI Findings, ¶46).

Universal's proposed finding, which it relates to questions both of remote control capability and WJUX local telephone service, that WJUX "did not have a separate phone line or telephone instrument . . . until July 1995" (Universal Findings, ¶43), is contrary to the record. The Bureau proposes a similar finding at paragraph 94 of its Proposed Findings. WJUX's local phone line and telephone instrument were used for outgoing calls during at least the billing period ending June 13, 1995, in advance of the Goldstein inquiry letter. Bureau Ex. 23, p. 537. WJUX had its own phone line beginning in November 1994. *Id.* at 516. Moreover, while Universal does not specifically claim that lack of a WJUX telephone instrument would defeat WJUX's dial-up remote control, it is clear it would not. Any telephone instrument, including WVOS' may be used to control the WJUX transmitter. Tr. 963, 968.

With respect to WJUX's staff, the Bureau claims that Blabey and Montana do not constitute a "meaningful management and staff presence." Bureau Findings, ¶160. Specifically, the Bureau contends that their employment duties and salaries indicate they are not full-time employees, but "caretakers" of the station. *Id.* The Bureau also claims that Blabey does not have a regular schedule at WJUX, but comes and goes as necessary in order to attend to WVOS matters. *Id.* at ¶161. With respect to Montana, the Bureau claims that she does nothing to ascertain WJUX's community needs and interests, nor does she ensure that the station's programming is responsive to those needs and interests. *Id.* at ¶162.

Similarly, Universal claims that the employment positions of Blabey and Montana are "nominally managerial" because, according to Universal, the functions they perform are not

managerial, but, rather, staff functions. Universal Findings, ¶68. In addition, Universal claims that Blabey's employment position at WJUX either violates the Commission's cross-interest policy, or that Stations WVOS and WJUX do not compete against one another. *Id.* Universal also alleges that WJUX did not have a licensed duty operator present at the time of Loginow's inspection. *Id.* at ¶69.

Despite their arguments, the Bureau and Universal have failed to establish that the employment of Blabey and Montana does not satisfy the Commission's requirement of maintaining a "meaningful management and staff presence" as set forth in *Jones Eastern of the Outer Banks*, 6 FCC Rcd 3615 (1991), *clarified*, 7 FCC Rcd 6800, *aff'd*, 10 FCC Rcd 3759 (1995). In his position as General Manager, Blabey is generally at the WJUX main studio during normal business hours. Tr. 909-10, 916, 948. As set forth in MMBI's Findings at ¶33, Blabey performs a number of functions in his managerial position, including arranging for programming for WJUX. *Id.*, citing Tr. 915. As one example, Blabey previously elected to air emergency announcements regarding Sullivan County on WJUX. Tr. 979-80. Upon receiving a call from the Sullivan County Manager advising that all roads in the county would be closed due to a snow storm, Blabey called Jukebox Radio to inform the network that he had an emergency message to air on WJUX. Blabey then prepared the message and faxed it to the Jukebox Radio studio where it was originated. Tr. 980-81. Blabey also has recommended prospective WJUX employees to Weis, and Weis has hired each of these persons. Tr. 914. With the exception of Alan Kirschner, WJUX's current chief operator, everyone who is employed by WJUX was recommended by Blabey. *Id.* Blabey also has been active in the community on behalf of WJUX, serving as President of the Chamber of Commerce and on the local emergency planning commission. In each of these positions, Blabey represented both WJUX and WVOS. *See* MMBI Findings, ¶31, citing Tr. 933, 914.

Montana also is at the WJUX main studio during normal business hours. As set forth in MMBI's Findings at ¶¶37-38, Montana performs a number of tasks for WJUX on a daily basis. In addition to Blabey and Montana, WJUX also employs George Spicka and Charles Martin, both of whom work on a part-time basis. Tr. 937-38, 974-75.

The Bureau's and Universal's attempt to discredit the employment of Blabey and Montana due to certain of Blabey's employment duties and their respective salaries fails to account for the fact that Jukebox Radio is providing substantially all of the programming and advertising for WJUX.⁶ As is the case with any station operating pursuant to a time brokerage agreement,⁷ there are very few "management" responsibilities for the staff of the brokered station to perform when the timebroker is providing all (or substantially all) of the programming time and selling the advertising time within such programming. Indeed, although the Bureau and Universal claim that Blabey and Montana cannot perform their required functions for WJUX due to their employment responsibilities at WVOS, they have failed to point to even one management function or responsibility that Blabey and/or Montana are not performing in connection with WJUX.⁸

⁶ The Bureau and Universal also fail to recognize that in small town radio, a manager performs a host of non-managerial duties. *See* Tr. 931-32.

⁷ Although the programming arrangement between WJUX and Jukebox Radio has been labeled a "Network Affiliation Agreement" ("Affiliation Agreement"), as Universal notes, the agreement is, in essence, nothing more than a traditional time brokerage agreement. *See* Universal Findings, ¶60, n.24.

⁸ The fact that Blabey and Montana are paid less than what might be regarded as a standard salary for a general manager or public affairs director of a Sullivan County radio station is consistent with the fact that, due to the Affiliation Agreement between WJUX and Jukebox Radio, substantially less time is required of each of them to perform their duties than if the station was not being operated pursuant to a time brokerage agreement.

Moreover, the Commission expressly acknowledged Blabey's and Montana's employment relationship with MMBI in its *Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing*, 12 FCC Rcd 6264 (1997) ("*HDO*"). It is significant that the Commission did not find that Blabey could not, as a matter of law, fulfill a management function at WJUX -- or constitute a full-time managerial presence -- due to his position as the owner/general manager of WVOS. See *HDO*, 12 FCC Rcd at 6271, n.15. Therefore, even assuming, *arguendo*, the Presiding Judge were to find that Blabey and Montana do not satisfy the requirement of a "meaningful management and staff presence" at WJUX, the Commission cannot expect MMBI and/or Weis to have known that such a relationship would not satisfy the Commission's main studio rule when the Commission did not make that determination -- as a matter of law -- in its *HDO*.

Furthermore, the Commission's cross-interest policy cannot be retroactively applied here to disallow MMBI credit for Blabey's managerial position. In acknowledging the nature of Blabey's and Montana's positions at WVOS and WJUX in its *HDO*, the Commission declined to designate a cross-interest policy issue against MMBI. Instead, the Commission stated as follows:

While such a simultaneous relationship may not be strictly prohibited under our ownership and attribution rules and policies, a question nevertheless remains as to whether, under these circumstances, such a presence at the station by these particular individuals represents that type of "meaningful management presence" contemplated by our main studio rule.

HDO, 12 FCC Rcd at 6271, n.15. Therefore, on the facts of this case, the cross-interest policy should have no effect upon the determination of whether MMBI's employment of Blabey and Montana constituted a "meaningful management and staff presence" at WJUX's main studio because the Commission had an opportunity to designate such an issue against MMBI, but declined to do so.

Finally, although Universal cites Sections 73.1860 and 73.1400 of the Commission's rules

in support of its contention that WJUX did not have a licensed duty operator present at the time of the April 13, 1995, inspection (Universal Findings, ¶69 and n.26), the record does not support any such conclusion. Universal and the Bureau did not undertake to establish that there was no licensed duty operator at the Jukebox Radio studio location during the inspection of WJUX, nor did Loginow make any such claim. Moreover, Section 73.1860 is not the subject of a designated issue in the *HDO*, nor is it even referenced in that order. Paragraph 27 of the *HDO* expressly states, “this Order shall constitute a Bill of Particulars with respect to all of the foregoing issues.” 12 FCC Rcd at 6274. Therefore, the question of whether there was a licensed operator on duty during the April 1995 inspection, either at WJUX’s main studio or its primary remote control point at Jukebox Radio’s studios in Dumont, New Jersey, is not relevant to any designated issue.

II. The Bureau Failed to Establish that MMBI Engaged in an Unauthorized Transfer of Control or Otherwise Abdicated Control of Station WJUX to Turro in Violation of Section 310(d) of the Communications Act and Section 73.3540(a) of the Commission’s Rules.

The Bureau and Universal contend that MMBI engaged in an unauthorized transfer of control of Station WJUX because, according to their arguments, Turro has controlled all aspects of the station’s finances, programming, and personnel. Nevertheless, the record reflects that although Weis/MMBI and Turro/Jukebox Radio were involved in an ongoing business relationship through the Affiliation Agreement, MMBI has always maintained ultimate decision-making authority over all aspects of WJUX’s operation.

Finances. With respect to station finances, the Bureau claims that, through the monthly payments under the Affiliation Agreement, Turro has provided all of the funds to operate WJUX and ensure a pre-determined profit for Weis. Bureau Findings, ¶128. Turro also paid Weis \$40,000 as

an “inducement” fee to enter into the Affiliation Agreement, which coincided with the amount that Weis paid to Larry Fishman as a down payment for the WJUX construction permit. *Id.* at ¶134. The Bureau notes that Turro also signed a personal guaranty to assure the payment of these obligations to Weis.⁹ *Id.* at ¶128. In addition, the Bureau claims that MMBI has no source of revenue other than Jukebox Radio, and that MMBI is totally dependent upon the funds it receives under the Affiliation Agreement to operate WJUX. *Id.* at ¶135.

As demonstrated in MMBI’s Findings at ¶¶80-82, although Turro has provided certain funds to Weis/MMBI through the “inducement” fee to enter into the Affiliation Agreement and made monthly payments to MMBI under that agreement, Weis (through MMBI) has sole responsibility for WJUX’s finances. Tr. 1449. In addition to writing all of the checks to pay for the construction of WJUX, the station’s staff, and WJUX’s operating expenses (Tr. 1358),¹⁰ Weis personally guaranteed the tower lease agreement between MMBI and Mountain Broadcasting Corporation (“MBC”).¹¹ Weis also provided a personal guaranty in connection with MMBI’s lease for its main studio and office space with MBC.¹² MMBI Ex. 5, pp. 10, 14.

⁹ The Bureau’s proposed finding at ¶61, repeated for emphasis at ¶65, that the Guaranty of Payment would obligate BCCBF to pay any forfeitures assessed against MMBI as a result of this proceeding is on an important point and is absolutely the reverse of the cited testimony at Tr. 1364. This is beyond mere carelessness.

¹⁰ Neither Blabey nor Montana have the authority to sign MMBI paychecks. Tr. 937. Instead, Blabey forwards all financial-related matters to Weis for his immediate attention. Tr. 915. Montana also does not handle WJUX’s finances. Tr. 853. She brings bills to the attention of Blabey and Weis for payment. Tr. 819-20.

¹¹ MBC is the licensee of Stations WVOS(AM)/(FM), Liberty, New York.

¹² The Bureau’s claim (Bureau Findings, ¶54) that “Weis did not sign a similar [*i.e.*, personal] guaranty for the antenna site” is not supported by a record citation, and is, in fact, flatly
(continued...)

In addition, MMBI made all payments to Fishman under the promissory note for the remaining portion of the purchase price for WJUX's construction permit. MMBI Ex. 1, p. 2. MMBI also has made the lease payments for its main studio and transmitter site, and has paid all of the compensation to the persons it employs in the operation of WJUX. *Id.* at 3. Further, MMBI has paid all bills for services, products, and utilities used in the operation of WJUX, with the sole exception of the station's telephone bills during the period from October 1994 to mid-1995, when those bills were sent by NYNEX to Jukebox Radio. *Id.* MMBI has paid all subsequent telephone bills for WJUX. *Id.*

On the other hand, Turro and/or his affiliated entities have never guaranteed any debt incurred by MMBI, nor have they guaranteed MMBI's performance under any contract or lease entered into by MMBI. MMBI Ex. 1, p. 6. Moreover, neither Turro nor his affiliated entities has paid for any of the costs of constructing WJUX. Tr. 2081-82. Turro also has not paid, and is not obligated to pay, any of the legal expenses incurred by MMBI. Tr. 1958-59.

If Jukebox Radio misses a monthly payment under the Affiliation Agreement or otherwise refuses to continue making its monthly payments under that agreement, MMBI remains financially obligated to pay WJUX's lease payments and other financial obligations. Tr. 1450. Although MMBI could terminate the Affiliation Agreement and sue Turro and his affiliated entities in an effort to recover the monthly payments due under that agreement, MMBI would have to continue to pay the station's operating expenses. Tr. 1450-53.

¹²(...continued)
contradicted by the record. MMBI Ex. 5, p. 11; Tr. 1431-32.

As a further illustration of Weis' control over WJUX's finances, Weis requested an increase in the monthly payments under the Affiliation Agreement of approximately \$100 per month in order to cover MMBI's additional capital expenditures for a standby generator and auxiliary transmitter. Tr. 2100, 1366-68. Turro agreed to the increased monthly payments because Weis planned to install the generator at the WJUX transmitter site, which would protect Jukebox Radio's equipment at that location. Tr. 2100-01, 2116. Turro explained that Jukebox Radio was willing to make the increased payments because it was getting a reasonable value in return. Tr. 2100-01.

Weis' ability to extract increased monthly payments under the Affiliation Agreement flies in the face of the Bureau's and Universal's contention that Weis is a mere "straw man" for Turro and that Turro is in complete control of WJUX. Although Turro undoubtedly benefits from being able to provide programming to WJUX under the Affiliation Agreement, and thereby is able to rebroadcast that programming over his Pomona and Fort Lee translators, the fact that Weis was able to extract increased monthly payments under the Affiliation Agreement demonstrates that, far from being the alleged "straw man" for Turro, it is Weis -- not Turro -- that controls the operation of WJUX. Indeed, the Bureau and Universal cannot seriously contend that if Turro had, in fact, control of WJUX's finances, he would elect to pay Weis an additional \$100 per month under the Affiliation Agreement, so that WJUX would have the benefit of the additional technical equipment.¹³

¹³ There is no evidence in the record to support the proposition that it was Turro, rather than Weis, who wanted the additional equipment. In the Bureau's conclusions regarding the misrepresentation/lack of candor issue, the Bureau acknowledges that Weis was responsible for the purchase of the additional equipment:

. . . [W]hen Weis, in one of the few decisions he made for the station, purchased additional, costly equipment, he merely informed Turro that the monthly payments would be increased to cover these expenditures. Turro never questioned

(continued...)

The facts outlined above establish that although Weis structured MMBI's acquisition of the WJUX construction permit in a manner that would be financially favorable to him, and elected to operate the station under a "network affiliation agreement" in order to reduce his financial risk due to the "poor and rural" nature of Sullivan County,¹⁴ the record does not support the Bureau's and Universal's contentions that Turro and/or his affiliated entities control WJUX's finances.

Programming. The Bureau and Universal claim that Turro has ultimate control of WJUX's programming. Although MMBI reserved the right to preempt or reject Jukebox Radio's programming under the amended Affiliation Agreement, Universal claims that MMBI has not exercised that right. Universal Findings, ¶63. According to Universal, all programming, including station identifications and public service announcements, is produced by Jukebox Radio, with only two exceptions: (i) WJUX airs a weekly local public affairs program produced by WVOS, which is rebroadcast on WJUX after it has aired on WVOS; and (ii) subsequent to July 1995, WJUX now originates weekly EBS/EAS tests. *Id.*

Despite the Bureau's and Universal's allegations, the record reflects that Weis has retained ultimate supervisory control over WJUX's programming. At the time Weis acquired the WJUX permit and agreed to enter into the Affiliation Agreement, he knew that Jukebox Radio would provide programming consisting of popular music, including music from the big band era, which

¹³(...continued)
or objected to these increased payments; he simply paid them.

Bureau Findings, ¶189. Indeed, if it had been Turro who wanted the additional equipment, it is much more likely that he would have purchased the equipment himself and made it available to WJUX since it obviously was of benefit to him and Jukebox Radio.

¹⁴ Universal Findings, Summary, p. iii, and ¶65.

Weis believed would appeal to a large segment of the residents of Sullivan County. MMBI Ex. 1, p. 7. In addition, at the time WJUX commenced operations, Weis directed WJUX's staff to ensure that the station would carry public affairs programming and PSAs aimed at serving Monticello and Sullivan County, New York. *Id.*; Tr. 1439-40, 1442.

In order to provide such public affairs and public service programming, Weis directed Blabey to come up with ideas for public service programs. Tr. 996. Weis also arranged to have public affairs programs produced by Blabey, which were aired on WVOS, rebroadcast over WJUX on different days and at different times than they were broadcast on WVOS. MMBI Ex. 1, pp. 7-8. As Weis explained, these programs would then be heard by a separate listening audience in Sullivan County than originally heard them over WVOS. *Id.* Turro testified that when Weis and Blabey arranged to have public affairs programming available for broadcast on WJUX, he decided that Jukebox Radio would carry such programming. Tr. 2098.

Public affairs programming that is produced in Sullivan County for broadcast on WJUX is forwarded by Blabey to Jukebox Radio. Tr. 1433. As stated above, some of the programming is originally produced by Blabey for broadcast on WVOS. Tr. 954, 1434. For example, the program "Open Mike" was originally aired on WVOS and later rebroadcast on WJUX. Tr. 955. "Open Mike" provides a platform for community leaders to appear and be questioned regarding their areas of interest, and take telephone questions from listeners. Tr. 955. Another program produced specifically for the Sullivan County audience, "People Who Make A Difference," first broadcast by WJUX no later than February 2, 1995 (MMBI Ex. 3, p. 7), was produced by Ed Field in the WJUX studio (Tr. 1022-24), and was recognized by WJUX listeners as a WJUX program, and by WVOS

listeners as a WVOS program. Tr. 1025. Its broadcast on WJUX was not a delayed broadcast of a prior WVOS broadcast. Tr. 1024.

Weis also arranged for the broadcast of public service announcements of interest to the residents of Monticello and Sullivan County. MMBI Ex. 1, pp. 7-8. Montana is responsible for gathering material for public service announcements and arranging for them to be broadcast over WJUX. *Id.* She has lived in Sullivan County for almost 20 years. People in the community know that she works for WJUX and advise her of upcoming community events for broadcast on the station. Tr. 822-23. Montana testified that people in the local community know that she handles public service announcements for WJUX, and she receives PSAs addressed to WJUX. Tr. 825. Montana decides which PSAs should be aired and prepares the PSA bulletin board for WJUX. Tr. 824-26. She also receives the quarterly issues/programs lists for WJUX once they are prepared, and puts them in the WJUX public file in the Monticello Public Library. Tr. 856-57.

An additional factor demonstrating Weis' control over WJUX's programming is reflected in his decision, in September 1995, that WJUX would not accept political advertisements until further notice. MMBI Ex. 35, p. 699; Tr. 927. Weis advised Blabey of his decision concerning political advertisements and instructed him to follow through on it. Tr. 927. Although Weis later changed this policy (Tr. 928), the implementation of his policy concerning political advertisements provides a further illustration of his control over WJUX's programming.

The facts outlined above establish that Weis has maintained ultimate control of WJUX's programming because he was fully aware of the Jukebox Radio format before entering into the Affiliation Agreement, and believed that it would appeal to a broad segment of Sullivan County. Weis also has exercised supervisory control over the public affairs programs and PSAs that have

aired on WJUX. Although the Bureau and Universal make much of the fact that WJUX's public service programs also have aired on WVOX, they have failed to demonstrate how the rebroadcasting of certain programs on WJUX somehow reduces the public interest value of such programming. Indeed, there is no evidence that WJUX's public affairs programming does not serve the needs and interests of Monticello and the surrounding area. Moreover, because the record reflects that Stations WJUX and WVOX serve different audiences in Sullivan County (Tr. 990), the fact that certain public interest programs are rebroadcast on WJUX serves only to ensure that a separate listening audience in Sullivan County has an opportunity to hear such programming. Furthermore, as stated above, the only complaint WJUX has received concerning its programming was that it was not airing enough Perry Como music. Tr. 884-85.

These facts establish that Weis has exercised supervisory control over WJUX's programming and implemented a satisfactory means of ensuring that WJUX airs programming designed to meet the needs and interests of Sullivan County. Therefore, the record establishes that MMBI has retained ultimate control over the station's programming.

Personnel. Neither the Bureau nor Universal seriously contend that Weis does not exercise control over WJUX personnel. The Bureau claims that Weis exercised "nominal control" over WJUX personnel, to the extent the station had any personnel. Bureau Findings, ¶152. Universal claims, however, that Blabey and Montana performed only "menial" tasks at the station. Universal therefore argues that the primary remote control point of WJUX, and the origin of all of the station's programming, is Jukebox Radio's Dumont studio where Turro served as an unpaid chief operator until July 1995. Universal Findings, ¶62.

The Bureau and Universal have failed to establish that Weis does not have ultimate control over the WJUX personnel. Indeed, the opponents' arguments are directed more at the main studio issue than a determination of whether Weis/MMBI exercises supervisory control over the WJUX personnel. The record reflects that Weis was solely responsible for hiring Blabey, and, at Blabey's recommendation, Montana and George Spicka.¹⁵ MMBI Ex. 1, pp. 6-7. Weis also was directly responsible for hiring Alan Kirschner, who replaced Turro as WJUX's chief operator in August 1995. Tr. 937-38.

Blabey characterized his role as recommending employees to Weis for hiring. Tr. 937. Blabey had several meetings with Weis before he was hired to become the general manager. Tr. 946. Montana learned of the employment opportunity at WJUX from Blabey. Tr. 816-17. Blabey introduced Montana to Weis sometime prior to October 1994, and she discussed a position at WJUX with Weis at that time. Tr. 818. When Montana was hired by Weis in October 1994, she entered into a letter agreement with Weis which was to become effective upon the commencement of broadcast operations. Bur. Ex. 12; Tr. 823, 837.

Although Blabey supervises Montana's work at WJUX and she consults with him on WJUX matters, she testified that she ultimately reports to Weis, who is the owner of the station and her ultimate supervisor. Tr. 838, 950, 818, 893. Montana meets with Weis concerning WJUX business on an as-needed basis. Tr. 893-94.

¹⁵ Spicka was hired to conduct weekly Emergency Action Notification System (EANS) tests (formerly EBS tests) and meter readings. Tr. 839. He is a WJUX employee (not a consultant), and does not work for WVOX. Spicka works between one and two hours per week checking equipment and performing the EANS tests. He also visits the WJUX transmitter when necessary. *Id.*

These facts establish that Weis exerts exclusive control over Blabey, Montana, and the other WJUX employees. The record contains no evidence that Turro has any control over the WJUX staff.

Sharing of FCC Counsel and Engineer. The Bureau claims that an additional factor which suggests that MMBI has engaged in an unauthorized transfer of control is that MMBI and Turro used the same FCC counsel and same consulting engineering firm until after the *HDO* was issued. Bureau Findings, ¶¶49-50. The Commission has repeatedly held, however, that the sharing of legal counsel and engineers does not require a finding of common control. *See, e.g., Sevier Valley Broadcasting, Inc.*, 10 FCC Rcd 9795 (1995), citing *Cannon's Point Broadcasting*, 93 FCC 2d 643 (Rev. Bd. 1983) (subsequent history omitted); *Stuart W. Epperson*, 35 FCC 2d 565, 568 (Rev. Bd. 1963) (sharing of attorney and engineer in connection with past applications does not require a finding of common control when there is abundant direct testimony to the contrary). Therefore, the mere fact that MMBI and Turro used the same FCC counsel and consulting engineering firm prior to the issuance of the *HDO* does not require a finding that they have engaged in an unauthorized transfer of control.

In an effort to lend weight to its assertions concerning use by MMBI and Turro of the same FCC counsel, the Bureau found significance in Turro's July 1995 response to the Goldstein inquiry letter having been filed with the FCC "with a cover letter on Koteen & Naftalin letterhead," while "MMBI's [response] was not." The Bureau charges that in this way "Weis chose to withhold . . . from the Bureau" the information that Koteen & Naftalin had prepared MMBI's response, and claims that from this "one can infer" that "Weis was attempting to conceal the fact that MMBI shared counsel with Turro." All of this is in paragraph 149 of the Bureau's proposed conclusions, and it is all wrong. We are attaching to this Reply the July 28, 1995, Koteen & Naftalin cover letter under

which MMBI's response to the Goldstein inquiry was tendered to the Commission. We note that MMBI's response to the inquiry is a Bureau exhibit, not an MMBI exhibit, and appears at least twice in the record, as Bur. Ex. 11 and at p. 487 of Bur. Ex. 23, without its Koteen & Naftalin cover letter. MMBI assumes that between July 1995 and the summer of 1997 the Bureau quite innocuously lost the Koteen & Naftalin cover letter. The Bureau, on the other hand, and as in so much of this case, assumes the worst.

Relevant Case Law. A case which helps demonstrate that MMBI has retained ultimate decision-making authority over WJUX is *Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534 (1997). In *Choctaw*, the permittee of an unbuilt FM station agreed to sell the station to a prospective purchaser who would acquire and install the necessary equipment, and program the station pursuant to a time brokerage agreement ("LMA"). The LMA provided, *inter alia*, that the permittee would employ a full-time operations manager and chief operator, and obligated the broker to pay the permittee \$1,000 per month for its airtime.¹⁶ 12 FCC Rcd at 8535, 8539.

The Commission expressed its concern regarding the proposed arrangement by noting that the broker not only was providing substantially all of the programming for the station, but it also was the prospective purchaser. *Id.* at 8543. As a result, the Commission stated that the broker's selection and installation of the equipment for the station, albeit with the permittee's claimed approval and oversight, raised serious concerns regarding the permittee's retention of control of the station. *Id.* The Commission also noted that its concern was "exacerbated" by the fact that the permittee's chief operator (engineer), who was responsible for overseeing construction, also was an employee of the

¹⁶ The \$1,000 per month payment included a "base compensation" plus an allowance for the permittee's anticipated reasonable and prudent operating expenses. 12 FCC Rcd at 8539.