

DOCKET FILE COPY ORIGINAL

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

RECEIVED

OCT 20 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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, NJ, and)	
W232AL(FM), Pomona, NY)	
)	
MONTICELLO MOUNTAINTOP)	
BROADCASTING, INC.)	
)	
Order to Show Cause Why the Construction)	
Permit for FM Radio Station WJUX(FM),)	
Monticello, NY, Should Not Be Revoked)	

To: The Commission

MASS MEDIA BUREAU'S
EXCEPTIONS TO INITIAL DECISION

Roy J. Stewart
Chief, Mass Media Bureau

Norman Goldstein
Chief, Complaints and Political
Programming Branch

James W. Shook
Alan E. Aronowitz
Attorneys
Mass Media Bureau

Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

October 20, 1999

No. of Copies rec'd 074
List ABCDE

Summary

The Initial Decision (“ID”) concluded that Gerard A. Turro’s (“Turro”) operation of the Fort Lee and Pomona translators did not violate Section 74.1231(b) of the rules but did violate Section 74.531(c) between late October 1994 and early July 1995. However, the ID determined that, notwithstanding the violation, a forfeiture was time barred. The ID further concluded that Monticello Mountaintop Broadcasting, Inc. (“MMBI”) always maintained control of WJUX. Similarly, the ID concluded that neither Turro nor MMBI had made misrepresentations or lacked candor with respect to the operation of their stations. The ID also concluded that MMBI did not violate Sections 73.1120 and 73.1125(a) of the rules concerning the maintenance of a main studio. With respect to Section 73.1125(c), although the ID concluded that, for a 12-day period, MMBI had violated the rule by failing to maintain a local telephone number, the ID determined that no sanction was warranted for that violation. In view of the foregoing, the ID granted Turro’s applications for renewal of the Fort Lee and Pomona translator licenses and did not revoke MMBI’s construction permit for WJUX.

The Bureau submits that the ID erred in concluding that MMBI, not Turro, controlled WJUX. Moreover, by failing to conclude that Turro controlled WJUX, the ID compounded the error by concluding that MMBI complied with the main studio rule and that Turro and MMBI did not lack candor with respect to the operations of the Fort Lee and Pomona translators and WJUX. Accordingly, Turro should have been denied renewal of license for the translator stations and MMBI’s permit should have been revoked. In the alternative, forfeitures should have been imposed.

Table of Contents

	<u>Page</u>
Preliminary Statement	1
Statement of the Case	1
Questions Presented	4
Arguments	
Turro was in <i>de facto</i> control of WJUX	4
MMBI did not maintain a meaningful management-level presence at the WJUX main studio	15
Turro and MMBI lacked candor with respect to the control of WJUX	17
Conclusion	19

Table of Authorities

<u>Cases, Decisions and Rulings</u>	<u>Page(s)</u>
<u>Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing</u> , 12 FCC Rcd 6264 (1997) (“ <u>HDO</u> ”)	1-3, 16
<u>Initial Decision of Administrative Law Judge Arthur I. Steinberg</u> , FCC 99D-03 (released August 16, 1999) (“ <u>ID</u> ”)	passim
<u>KQOK, Inc.</u> , 10 FCC Rcd 132 (MMB 1995)	17
<u>RKO General, Inc.</u> , 35 FCC 2d 100 (1972).	13
<u>The Seven Hills Television Company</u> , 2 FCC Rcd 6867 (Rev. Bd. 1987)	14
<u>Trinity Broadcasting of Florida, Inc.</u> , 8 FCC Rcd 2475, 2477 (1993) (“ <u>Trinity HDO</u> ”)	13-14
<u>Trinity Broadcasting of Florida, Inc.</u> , FCC 98-313, released April 15, 1998, <i>appeal pending</i> , <u>Trinity Broadcasting of Florida, Inc. v. FCC</u> , No. 99-1183 (D.C. Cir.) (“ <u>Trinity Decision</u> ”)	14, 19
<u>Turner Broadcasting System, Inc.</u> , 101 FCC 2d 843, 848 (1985)	13
<u>WGPR, Inc.</u> , 10 FCC Rcd 8140, 8145 (1995), <i>vacated in part on other grounds sub nom. Serafyn v. FCC</i> , 149 F.3d 1213 (D.C. Cir. 1998).	9
<u>William S. Paley</u> , 1 FCC Rcd 1025 (1986), <i>recon. denied</i> , 2 FCC Rcd 2274 (1987), <i>aff’d sub nom. Fairness in Media v. FCC</i> , 851 F. 2d 1500 (D.C. Cir. 1988)(<i>mem.</i>)	13
 <u>Communications Act of 1934, as Amended</u>	
Section 310(d)	1, 2
Section 503(b)	3

Commission Rules

Section 1.276	1
Section 73.1120	2
Section 73.1125	2
Section 73.3540(a)	1, 2
Section 74.531(c)	1
Section 74.1231(b)	1
Section 74.1232(d)	5

Mass Media Bureau's Exceptions to Initial Decision

Preliminary Statement

1. The Mass Media Bureau, by its attorneys and pursuant to Section 1.276 of the Commission's Rules, hereby respectfully submits its exceptions to Initial Decision of Administrative Law Judge Arthur I. Steinberg, FCC 99D-03 (released August 16, 1999) ("ID"). In support whereof, the following is shown.

Statement of the Case

2. This proceeding involves the applications of Gerard A. Turro ("Turro") for renewal of license of translator radio stations W276AQ(FM), Fort Lee, New Jersey ("Fort Lee translator"), and W232AL(FM), Pomona, New York ("Pomona translator"). The Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, 12 FCC Rcd 6264 (1997) ("HDO"), specified the following issues against Turro:

1. To determine whether Gerard A. Turro's operation of translator stations W276AQ (FM), Fort Lee, New Jersey, and W232AL (FM), Pomona, New York, violated Sections 74.531(c) and 74.1231(b) of the Commission's Rules with respect to the operation of translator stations.
2. To determine whether Gerard A. Turro engaged in an unauthorized transfer of control, or otherwise exercised and/or continues to exercise *de facto* control over WJUX(FM), Monticello, New York, in violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540(a) of the Commission's Rules.
3. To determine whether Gerard A. Turro misrepresented and/or lacked candor to the Commission concerning the operation of translator stations W276AQ(FM), Fort Lee, New Jersey, and W232AL(FM), Pomona, New York.
4. To determine whether, in light of the evidence adduced under the foregoing issues, the public interest will be served by the grant of the above-captioned renewal applications filed by Gerard A. Turro.

3. The HDO also directed Monticello Mountaintop Broadcasting, Inc. (“MMBI”) to show cause why the construction permit for Radio Station WJUX(FM) (“WJUX”) should not be revoked. The following issues were specified against MMBI:

5. To determine whether Monticello Mountaintop Broadcasting, Inc. has violated and/or continues to violate Sections 73.1120 and 73.1125(a) and (c) of the Commission's Rules with respect to the maintenance of a main studio for Station WJUX(FM), Monticello, New York.

6. To determine whether Monticello Mountaintop Broadcasting, Inc. engaged in an unauthorized transfer of control or otherwise abdicated control of Station WJUX(FM), Monticello, New York, to Gerard A. Turro or an affiliated entity in violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540(a) of the Commission's Rules.

7. To determine whether Monticello Mountaintop Broadcasting, Inc. and/or its agents misrepresented and/or lacked candor to the Commission concerning the operation of Station WJUX(FM), Monticello, New York.

8. To determine whether, in light of the evidence adduced under the foregoing issues, Monticello Mountaintop Broadcasting, Inc. possesses the requisite qualifications to be or remain a Commission broadcast permittee.

4. The HDO also stated that if the hearing record did not warrant denial of Turro’s license renewal applications or revocation of MMBI’s construction permit, it should be determined whether a forfeiture order for an amount not to exceed \$250,000 should be issued against Turro and/or MMBI for each of the alleged violations which occurred or continued within the applicable statute of limitations.

5. The HDO assigned the Mass Media Bureau (“Bureau”) the burden of proceeding with the introduction of evidence on all the issues. The ultimate burden of proof on Issues 1 through 4 was assigned to Turro, and the ultimate burden of proof on Issues 5 through 8 was

assigned to the Bureau. The HDO also made Universal Broadcasting of New York, Inc. (“Universal”) a party to this proceeding.

6. With respect to Issue 1, the ID concluded that Turro’s operation of the Fort Lee and Pomona translators did not violate Section 74.1231(b) of the rules but did violate Section 74.531(c) between late October 1994 and early July 1995. However, the ID determined that, notwithstanding the violation, a forfeiture was time barred.¹ The ID resolved Issues 2 and 6 in favor of Turro and MMBI, respectively, by concluding that MMBI always maintained control of WJUX. Similarly, the ID resolved Issues 3 and 7 in favor of Turro and MMBI, respectively, by concluding that neither had made misrepresentations or lacked candor with respect to the operation of their stations. With respect to Issue 5, the ID concluded that MMBI did not violate Sections 73.1120 and 73.1125(a) of the rules concerning the maintenance of a main studio. With respect to Section 73.1125(c), the ID concluded that, for a 12-day period, MMBI violated the rule by failing to maintain a local telephone number. However, the ID determined that no sanction was warranted for that violation. In view of the foregoing, the ID resolved Issues 4 and 8 in favor of Turro and MMBI, respectively. Accordingly, the ID granted Turro’s applications for renewal of the Fort Lee and Pomona translator licenses and did not revoke MMBI’s construction permit for WJUX.

7. The Bureau submits the ID erred in concluding that MMBI, not Turro, controlled WJUX. Moreover, by failing to conclude that Turro controlled WJUX, the ID compounded the error by concluding that MMBI complied with the main studio rule and that Turro and

¹ The Bureau does not except to the conclusion that the forfeiture is time barred. However, the Bureau respectfully requests that the Commission clarify that the applicable provision is Section 503(b)(6)(B) of the Act, not 503(b)(i) as cited in the ID at ¶ 291.

MMBI did not lack candor with respect to the operations of the Fort Lee and Pomona translators and WJUX. Accordingly, Turro should have been denied renewal of license for the translator stations and MMBI's permit should have been revoked. In the alternative, forfeitures should have been imposed.

Questions Presented

Whether the ID erred by concluding Turro was not in *de facto* control of WJUX.

Whether the ID erred by concluding that MMBI maintained a "meaningful" management-level presence at the purported main studio for WJUX.

Whether the ID erred by concluding that Turro and MMBI did not lack candor with respect to the control of WJUX.

Arguments

Turro was in *de facto* control of WJUX.

8. The Bureau submits that that the ID's ultimate resolution at ¶ 215, concluding that MMBI controlled WJUX, is contrary to the weight of the evidence. While the ID analyzes the record in light of the traditional criteria used by the Commission, it ignores the history leading up to the construction of the station. The ID also places undue emphasis on individual aspects relating to control and does not consider the totality of the circumstances in assessing the locus of control, which was Turro, not MMBI. Finally, the ID relies unreasonably on Turro's and MMBI's ameliorative behavior after their arrangement was under attack in concluding that it was in conformance with the Commission's policies. Accordingly, while the ID sees and describes many elements of control, it fails to put all of the elements into proper context. Had it done so, the ID would have concluded that Turro, not MMBI, is the controlling force behind WJUX.

9. As noted in the introductory portion of the ID at ¶ 8, Turro was a life-long resident of Bergen County, New Jersey. One of his plans was to provide an FM radio service to Bergen County. To fulfill that plan, Turro repeatedly sought Commission approval to originate programming over his Fort Lee translator. ID at ¶ 11. When those efforts failed, Turro tried a different approach. He requested and obtained in 1991 an “informal” letter ruling (“Letter Ruling”) from the Bureau. Relying on the scenario presented by Turro, the Letter Ruling allowed him to purchase time² on a full-power station and then rebroadcast that programming over his translator even though the translator would be operating outside of the originating station’s “primary contour.” The only provisos contained in the Letter Ruling were that: the time brokerage contract be kept at the primary station; there must be a *bona fide* arms-length transaction between the primary station and the translator; the licensee of the translator station would have to pay the primary station a rate charge comparable to the amount charged other purchasers of brokered airtime; and the translator station would not be able to receive financial support from the primary station. ID at ¶¶ 12-13. While he looked for a suitable arrangement, Turro broadcast his programming, known as Jukebox Radio, from a noncommercial station he controlled in Franklin Lakes, New Jersey,³ beginning in March

² In this regard, the ID acknowledges in ¶ 12 that Turro did not disclose to the Bureau that he intended to purchase all of the primary station’s airtime. At ¶ 295, however, the ID excuses this because, inter alia, contemporaneous Commission rulings concerning time brokerage agreements set no limits on the amount of time a station could sell.

³ Commission records reflect that the Franklin Lakes station had the WJUX call sign from May 26, 1993 until March 24, 1995. (Official Notice Requested) The Monticello station that is the subject of the instant revocation proceeding acquired the WJUX call sign on April 14, 1995. ID at n. 2.

1993, and rebroadcast that programming over his Fort Lee translator. ID at ¶¶ 6, 17; Mass Media Bureau Proposed Findings of Fact and Conclusions of Law (“PFCs”) at ¶¶ 9, 14.

10. In the summer of 1994, Turro learned of an available construction permit for a new FM station in Monticello, New York. Knowing that, because of Section 74.1232(d) of the Commission’s Rules, he could not own the station directly if he wished to deliver programming from the station to his Fort Lee translator, Turro enlisted a long-time business associate, Wesley Weis (“Weis”), to acquire the permit. PFCs at ¶¶ 15, 44-45; ID at ¶¶ 17-18. Turro introduced him to the permit’s seller, attended negotiating sessions involving the sales price and sales terms, supplied the initial cash necessary to close the deal, and committed himself and Jukebox Radio⁴ to make payments to MMBI that were more than sufficient to cover its anticipated expenses. ID at ¶¶ 18-26; PFCs at ¶¶ 50-51. In return, Turro received the right to program the station 24 hours a day, 7 days a week, 365 days a year, the right to receive all revenue from sales of commercials, and the right to rebroadcast the programming over the Fort Lee translator. ID at ¶ 23. These arrangements were memorialized in a “Network Affiliation Agreement,” executed on October 17, 1994. ID at ¶ 22. In addition, shortly thereafter, Turro acquired Weis’ interest in a Pomona, New York, translator. Apparently, Turro immediately acquired MMBI’s permission to rebroadcast the Monticello station over the Pomona translator, which gave Turro an additional broadcast outlet and source of revenue for his programming. ID at ¶ 6; PFCs at ¶ 17.

⁴ The entity actually supplying the programming was the Bergen County Community Broadcast Foundation, d/b/a Jukebox Radio. After January 1, 1995, FM 103.1, Inc., another business controlled by Turro, did business as Jukebox Radio. ID at ¶ 7. For ease of reference, we will use the designation “Jukebox Radio” to refer both to the supplier and the programming itself.

11. Although he had been involved in various aspects of the broadcasting business, Weis had never before owned a broadcast station and, prior to Turro's urging, had not been seeking to acquire one. ID at ¶ 9, 19-20; PFCs at ¶ 45. Indeed, Weis candidly observed that he had no business plan prior to committing himself to buy the Monticello permit. He further acknowledged that he would not have built the station but for the \$40,000 provided by Turro, which allowed MMBI to close the sale.⁵ ID at ¶¶ 20, 25. Weis also did not seek an independent legal opinion before undertaking the Monticello permit purchase. ID at ¶ 19. Rather, Weis relied on Turro's explanation of what the Letter Ruling meant, and, to the extent he sought legal advice, Weis received it from the same attorneys who represented Turro. ID at ¶¶ 18-19, 22, 24, 34; PFCs at ¶¶ 51, 66, 74.⁶

12. In short, Turro did far more than merely alert Weis to the opportunity presented by a Class A FM station in Sullivan County, New York. Indeed, but for Turro, Weis (MMBI) would not have acquired the permit. However, none of those indicia of Turro's control is considered in more than a cursory fashion in the ID's conclusions. ID at ¶¶ 218, 227, 236. Instead, the ID focuses on actions and events that begin with Weis' promise to buy the permit. Consequently, the ID fails to view subsequent events in their proper context and ascribes little or no weight to facts evidencing Turro's control. *Compare, e.g.,* ID at ¶¶ 223, 225, 232-35, 239, with PFCs at ¶¶ 127-55.

⁵ Turro paid Weis \$40,000 on October 17, 1994, in connection with the execution of the Network Affiliation Agreement. ID at ¶¶ 24-25. On October 18, 1994, Weis paid \$40,000 to the permit's seller. ID at ¶ 35.

⁶ It should be noted that the law firm that represented Turro at the hearing and continues to represent him is the same firm that had been providing advice to both Turro and Weis during the acquisition and construction of WJUX. ID at ¶¶ 51, 66.

13. The ID's erroneous conclusion regarding control is not solely based on its failure to consider the history preceding the acquisition of the WJUX construction permit by MMBI. Rather, the ID's error is compounded by its focus on minutiae related to each criterion traditionally used to assess control coupled with an inability or unwillingness to factor in the reason why WJUX was even built. In this regard, it is clear that WJUX was intended by Turro and Weis to serve as a vehicle to enable Turro to send programming to his Fort Lee translator in order to serve Bergen County. Conversely, it is also clear that WJUX was not purchased so that MMBI could serve Monticello and Sullivan County, New York, as it was authorized to do.

14. In assessing control of finances, the ID correctly observes that MMBI, not Turro, was legally committed to meet the various expenses attendant to operating WJUX. Thus, MMBI was obligated to pay back the note given to the seller of the permit, make studio and tower lease payments, and pay its "employees." ID at ¶¶ 220, 222. However, as noted above, Turro provided Weis with all of the funds needed to close on the sale of the permit. Moreover, upon construction of the station, Turro, in the Network Affiliation Agreement, committed to make payments to MMBI which were more than sufficient to cover all of MMBI's expenses. ID at ¶¶ 23, 26. Nothing in the record suggests that the amount of the payments were based on rates comparable to those charged to other purchasers of program time in Sullivan County, New York, as required by the Letter Ruling. ID at ¶ 13; PFCs at ¶ 98. Rather, the payments were fashioned to meet MMBI's expenses and commitments and ensure that Weis made a profit. In short, MMBI/Weis had a virtually no-risk deal insofar as its expenses were concerned. Conversely, operation of the Monticello station was totally

dependent on the money provided by Turro, and, should Turro fail, the Monticello station had no other means of survival. In this regard, the Commission has cautioned licensees:

“licensees engaged in time brokerage arrangements ... must operate ... as a stand-alone entity discrete from the broker. Thus, we require that licensees must maintain their own bank accounts, pay the salaries of their own employees, and remain responsible for their own obligations to programmers, utility companies, and other operational matters. In other words, the licensee should be ready and able to operate independently from the broker at anytime [sic] it believes the arrangement does not fulfill its public interest responsibilities.” WGPR, Inc., 10 FCC Rcd 8140, 8145 (1995), *vacated in part on other grounds sub nom. Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998).

While it is clear that MMBI maintained responsibility for its financial affairs insofar as it remained liable for its bills, it is also apparent that WJUX’s existence was totally dependent on Turro. The ID erroneously fails to find that such is the case.

15. In assessing control of personnel, the ID maintains that Weis, in his capacity as president of MMBI, “hired” Eugene Blabey (“Blabey”) as WJUX’s “general manager” and Carol Montana (“Montana”) as the station’s “public affairs director.” ID at ¶¶ 38-39, 49, 52, 82, 237. The ID also observes that a handful of additional persons sporadically appeared on the WJUX payroll between October 1994, when the station commenced operations, and 1997. ID at ¶¶ 90, 98-100, 236. What the ID notes in findings (ID at ¶¶ 40, 55, 59, 61, 102, 107, 111-12, 116, 119-21) but glosses over in conclusions (ID at ¶¶ 228-29, 231-32, 234), however, is that WJUX’s operations were controlled by Turro and his staff from Turro’s Dumont studio, not by Weis, Blabey and Montana from the station’s so-called main studio in Ferndale, New York. Specifically, as reflected in the cited paragraphs, Turro, *inter alia*, controlled programming, sales of commercial time, remote control of WJUX’s transmitter, transmitter meter readings, and the main studio telephone. Notwithstanding the foregoing, the ID’s conclusions essentially limit consideration of Turro’s operational control to the main

studio issue. *See* ID at ¶¶ 255-56. Moreover, the ID erroneously ascribes virtually no significance to the fact that Turro was WJUX's first chief operator.⁷ ID at ¶ 239. Thus, the ID places inordinate value on MMBI's "control" of WJUX personnel, who, essentially, had nothing to do and were paid as if that were the case. ID at ¶¶ 50, 52, 84-90, 92-100, 236-38.

16. With respect to programming, the ID focuses, *inter alia*, on an Amendment to the Network Affiliation Agreement ("Amendment"), which was dated in November 1994, but not executed until July 17, 1995, several weeks after the Bureau sent letters of inquiry ("LOI") to Turro and MMBI. ID at ¶¶ 33-34, 237. The ID observes that the Amendment gave MMBI the right to preempt Turro's Jukebox Radio programming. ID at ¶ 32. However, the ID barely considers that MMBI did not exercise that right until 1997 when WJUX broadcast two political commercials instead of Jukebox Radio programming. ID at ¶¶ 65, 232; PFCs at ¶ 70.

17. The ID also supports its conclusion that MMBI controlled WJUX's programming by claiming that Weis directed that the station carry public affairs programming. ID at ¶ 54. In this regard, however, the first such program did not appear until February 1995 -- some four months after the station went on the air and after Universal filed its complaint -- and the ID is silent as to how long the program aired.⁸ ID at ¶ 56. Moreover, the ID notes, but does not consider significant, the facts that: WJUX's public affairs programs that were directed toward Sullivan County residents first aired on WVOS (Blabey's station); MMBI paid

⁷ Notably, when the Commission first inspected WJUX in April 1995, Blabey contacted Turro, not Weis, in order to address questions raised during the inspection. ID at ¶ 75.

⁸ A second such program, "Open Mike," first aired on WJUX in May 1996. ID at ¶ 57.

nothing for the programming;⁹ and Turro had the right to reject it in accordance with the Network Affiliation Agreement. ID at ¶¶ 55-57, 60, 228; PFCs at ¶¶ 71, 140. By comparison, a review of WJUX's issues/programs lists reflected that between November 1994 and December 1995, the preponderance of public interest programming broadcast by the station was clearly directed toward residents of Bergen County, the home of the Fort Lee translator. PFCs at ¶ 71. It thus appears that WJUX was far more apt to serve Bergen County, *i.e.*, the area Turro desired to serve, than it was its own community of license. If MMBI were actually in control of the station's programming and serious about serving its community, one would expect the mix of public affairs programming to show a bias towards Monticello and Sullivan County, New York, not Bergen County, New Jersey.

18. In analyzing the issue of control, the ID also fails to consider other circumstances that suggest control resided with Turro, not MMBI. As noted in PFCs at ¶ 72, Blabey and Montana, MMBI's "managers" for WJUX, did not even routinely listen to the station and had to be told by others when the station went off the air. Significantly, the ID's discussion of the programming and personnel aspects of control is silent about the program interruptions. Likewise, the change in call sign suggests that the station was under Turro's control. As noted in the ID, the station, when MMBI acquired the permit, was known as WXTM. ID at n. 2. Soon after, Turro relinquished the WJUX call sign that had been used by his Franklin Lakes station,¹⁰ and WJUX became the call sign for the Monticello station. PFCs at ¶ 79. The call sign "WJUX," of course, had nothing to do with MMBI or Weis; it was associated

⁹ MMBI did pay a \$10 per program "talent fee" for the host of the "Open Mike" program.

¹⁰ Indeed, that station went silent after MMBI acquired WJUX. PFCs at ¶ 9.

with Jukebox Radio, Turro's programming brand name. ID at ¶ 7. Nonetheless, the ID fails to consider the call sign change in assessing control.

19. Finally, the ID's erroneous conclusions regarding control appear to result from the ID's inordinate reliance on steps taken by Turro and MMBI to conform their arrangement to Commission policies once they became aware of the Commission's concern. For example, in order to conclude that MMBI maintained control of the programming aired on WJUX, the ID at ¶ 227 relies on the Amendment, which purportedly gave MMBI the ability to preempt Jukebox Radio programming. The Amendment, although dated November 1994, was not actually executed until July 17, 1995, after the Bureau sent letters of inquiry to both Turro and MMBI, several months after the station was first inspected by FCC personnel, and some nine months after the station went on the air. PFCs at ¶ 73. In any event, the Amendment did not change the fact that, with few exceptions, all of WJUX's programming originated in Dumont and was geared toward Bergen County, New Jersey, not Sullivan County, New York, where WJUX was situated. ID at ¶¶ 34, 65-66. Thus, the ID at ¶ 227 errs by according the Amendment dispositive weight in its assessment of control of programming, rather than recognizing it as a mere cosmetic attempt to hide Turro's role.

20. In its PFCs at ¶102, the Bureau established that Turro became aware that Universal was openly questioning the legality of the Jukebox Radio operation as early as the winter of 1995. Clearly, after the FCC inspections in April 1995, both Turro and MMBI were fully aware that the FCC had concerns about that operation. Turro himself concluded that the FCC

or Universal was responsible for a May 1995 “jamming incident”¹¹ involving WMG-499 and the Fort Lee translator. Certainly, by June 15, 1995, when the LOI were issued, Turro and MMBI were aware they were in the “spotlight.” Yet, the ID does not address this other than to note that “Turro stated that he was aware of the complaint lodged against him” ID ¶ 200. Commission policy, as well as common sense, dictates that less probative value can be given to exculpatory evidence arising from events occurring after notice is given that an application is in jeopardy or under scrutiny, *i.e.*, after the “spotlight” is on. *See* RKO General, Inc., 35 FCC 2d 100, 103 (1972). Consequently, in assessing the issue of control, the Commission, unlike the ID, should consider whether the evidence relates to an action that occurred before or after the parties became aware that their activities were being closely watched. As reflected above, most of the actions that are cited by the ID as evidencing MMBI’s, rather than Turro’s control, of WJUX occurred after both Turro and Weis were alerted to the Commission’s scrutiny of their arrangement. While the Bureau does not wish to discourage licensees from taking corrective action should questions arise about their compliance with the Act or our rules, we also believe that any fair assessment of compliance must account for all the circumstances, including when corrective actions were taken.

21. The ID correctly notes that there is no exact formula by which control of a broadcast station can be determined. Commission precedent establishes that questions of control must be decided on a case-by-case basis. *See, e.g.*, Trinity Broadcasting of Florida, Inc., 8 FCC Rcd 2475, 2477 (1993) (“Trinity HDO”); Turner Broadcasting System, Inc., 101 FCC 2d

¹¹ In attempting to determine the frequency of the signal received by Turro’s Fort Lee translator, FCC employee, Serge Loginow, Jr., used a portable signal generator, which resulted in the temporary disruption of the Fort Lee translator’s operations. ID at ¶¶ 155-74.

843, 848 (1985). In assessing the issue of *de facto* control, the Commission generally tends to focus its inquiry on the ability to control finances, programming and personnel. But those factors are not all-inclusive -- a wide variety of factors may also be relevant in reaching a determination of the locus of *de facto* control. William S. Paley, 1 FCC Rcd 1025 (1986), *recon. denied*, 2 FCC Rcd 2274 (1987), *aff'd sub nom. Fairness in Media v. FCC*, 851 F. 2d 1500 (D.C. Cir. 1988) (*mem.*). See, e.g., Trinity Broadcasting of Florida, Inc., FCC 98-313, released April 15, 1999, *appeal pending*, Trinity Broadcasting of Florida, Inc. v. FCC, No. 99-1183 (D.C. Cir.) ("Trinity Decision") (among the factors considered in determining *de facto* control were the interlocking relationships between the parties, dual roles of key officials, extensive use of mutual personnel and resources, and use of common use of legal and engineering resources); The Seven Hills Television Company, 2 FCC Rcd 6867 (Rev. Bd. 1987) (personnel matters not addressed, unique network arrangements and interlocking ownership and management considered). In fact, certain activities that might be individually acceptable to the Commission in the context of specific factual situations might nevertheless indicate that collectively, they have shifted the locus of *de facto* control. Trinity HDO, 8 FCC Rcd at 2477. Thus, as the Commission has also stated before, "a realistic definition of the word control includes any act which vests in a new entity or individual the right to determine the means of operating the licensee and determining the policy the licensee will pursue." *Id.* at 2480.

22. The Bureau submits that the ID overly emphasized the individual aspects of the interrelationship between Turro and MMBI to reach the conclusion that MMBI controlled WJUX. When all the circumstances, including the history leading up to the acquisition of WJUX by MMBI, are considered, a contrary conclusion is warranted. In this regard, it is

apparent that WJUX exists simply as a conduit for the delivery of Jukebox Radio programming to Bergen County, New Jersey, via Turro's Fort Lee and Pomona translator stations. Thus, WJUX should not be viewed as a Jukebox Radio "network" outlet under MMBI's control. Rather, it should be viewed as Turro's station, a station the Commission's rules do not permit him to control.

MMBI did not maintain a meaningful management-level presence
at the WJUX main studio

23. From ¶¶ 82-100, the ID discusses the activities of the WJUX staff, focusing primarily on Blabey, the so-called "general manager" of WJUX, and Montana, the station's so-called "public affairs director." Relying on those activities, the ID erroneously concluded that Blabey and Montana constituted a meaningful management presence at WJUX. ID at ¶¶ 262-63. The Bureau submits that the ID's conclusion is contrary to Commission policy.

24. The ID credits Blabey with a variety of actions on behalf of WJUX. Specifically, the ID found that Blabey represented WJUX in the community (ID at ¶ 85), recruited and suggested employees for MMBI to hire (ID at ¶ 86), routed mail and answered the telephone (ID at ¶ 87), and "periodically" monitored WJUX to determine whether it was broadcasting (ID at ¶ 88). The ID also states that Blabey arranged for programming, prepared Arbitron information requests, and was familiar with WJUX's issues/programs lists. ID at ¶ 87. The ID also recognizes, however, that the issues/programs lists themselves were prepared by Turro's Jukebox Radio staff. *Id.* In addition, although the ID characterizes Blabey as WJUX's "general manager," (ID at ¶¶ 38-39, 82-84), it acknowledges that the only writing evidencing his relationship with WJUX is Blabey's letter to MMBI which engages Blabey "as an independent consultant on radio station management matters." ID at ¶ 84. For his services, Blabey was paid a consulting fee of \$100 per week. PFCs at ¶ 84. The ID correctly

notes that Blabey was (and still is) an owner of Mountain Broadcasting Corporation (“MBC”), licensee of Stations WVOS-AM and FM, Liberty, New York, and that Blabey served (and still serves) as the Liberty stations’ general manager. ID at ¶¶ 37-38, 83. MBC is and has at all times been MMBI’s landlord for both the WJUX tower and studio, the latter of which is located at the main studio and offices for MBC’s WVOS-AM and FM in Ferndale, New York. ID at ¶¶ 36-37, 68. Obviously, Blabey’s overriding concern was the operation of WVOS and WVOS-FM, not WJUX. *E.g.*, ID at ¶¶ 84, 88.

25. With respect to Montana, the ID claims that she performed “numerous tasks” for WJUX each day. ID at ¶ 93. Those tasks are set forth in the ID at ¶¶ 93-97. Of particular note, the ID gives Montana credit for choosing the subject matter for WJUX’s PSA bulletin board. ID at ¶ 97. What the ID does not point out at this juncture, however, is that the PSA information was transmitted to Dumont (Turro’s studio) and the decision as to what PSAs were actually produced and broadcast was made there. PFCs at ¶ 89. (Tr. 827-28) Moreover, like Blabey, Montana was engaged initially as “an independent consultant on radio station management matters” PFCs at ¶ 87 (Tr. at 837). For her services, Montana received a “weekly fee” of \$25. MMB Ex. 12. Subsequently, so that she would not be responsible for paying her own social security and federal income taxes relative to her income for WJUX, her status was changed from consultant to employee. ID at ¶ 92. (Tr. at 838) The ID recognizes that, prior to and concurrent with her WJUX “employment,” Montana functioned full-time as WVOS’ business manager. ID at ¶ 91.

26. The Bureau recognizes that it has not been decided as a matter of law that persons such as Blabey and Montana are precluded from serving as managerial personnel of WJUX notwithstanding their roles at WVOS. HDO, 12 FCC Rcd at 6271, n. 15. At the same time,

however, the Bureau submits that the Commission did not envision that licensees such as MMBI would be able to fulfill their responsibility to maintain a meaningful managerial presence at their main studios by having potential competitors¹² serve as caretakers. Moreover, the inherent difficulty in exercising authority over rivals is exacerbated here given MBC's status as MMBI's landlord. Finally, and in any event, it is plain that MMBI's staff, such as it was, did not exercise any authority over Turro. *E.g.*, ID at ¶ 60. Accordingly, the Bureau submits that the instant situation is akin to that found objectionable in KQOK, Inc., 10 FCC Rcd 132 (MMB 1995). There, the Bureau concluded that a licensee did not have a meaningful management-level presence because the licensee could not show that the designated individual was authorized to make typical management decisions. Here, the record reflects that, with few exceptions, Turro, not Blabey or Weis, made decisions regarding the operations of WJUX. It was therefore error to conclude that Blabey and/or Montana constituted a meaningful management-level presence.

Turro and MMBI lacked candor with respect to the control of WJUX

27. In deciding Issues 3 and 6 in favor of Turro and MMBI, respectively, the ID credited, *inter alia*, Turro's and MMBI's claims that Turro does not control what WJUX broadcasts. ID at ¶¶ 203, 208, 297, 304. Those claims, which omitted material information, were made in response to Commission letters of inquiry directed to both Turro and MMBI and repeated in Weis' testimony. PFCs at ¶¶ 111, 115, 174; ID at ¶ 54. As explained above, the record reflects that Turro has always controlled WJUX's programming. Specifically, contrary to the implication contained in inquiry responses, which referenced the Network Affiliation

¹² Inasmuch as WJUX served a completely different area from the WVOX stations, one cannot realistically view the stations as actual competitors. *See* ID at ¶ 66.

Agreement and Amendment thereto, Turro did not simply provide a “network” feed to WJUX, which MMBI was free to accept or reject. *See* MMB Ex. 7, p. 3 (Stamped 00112); MMB Ex. 8, p. 4 (Stamped 00117); MMB Ex. 10, p. 2 (Stamped 00157). MMB Ex. 11, pp. 2-3 (Stamped 00162-63). Rather, virtually all WJUX programming, whether originated in Dumont or derived from tapes sent by Blabey (or PSA bulletin boards prepared by Montana), was transmitted from Dumont. ID at ¶¶ 34, 56-57, 59, 61, 81. Neither Weis, nor Blabey, nor Montana monitored the programming sufficiently to know whether, for example, Turro broadcast some, many or most of the PSA requests Montana sent via the WJUX PSA bulletin board. ID at ¶¶ 88, 95-97. Indeed, Turro admitted at the hearing that the “network” had complete discretion to reject programming received from Blabey and Montana. ID at ¶ 60. Moreover, the “Jukebox Radio staff,” *i.e.*, Turro, not Weis, Blabey or Montana, prepared the issues/programs lists, notwithstanding a provision in the Amendment which called for MMBI to be responsible for the compilation of the issues/programs lists. ID at ¶¶ 33, 87, 97. In light of the relative roles in the provision of programming, the Bureau submits that the compilation of the issues/programs lists was no mere administrative task; rather, it is consistent with a conclusion that WJUX’s programming was under Turro’s control. *See Trinity Decision*, FCC 98-313 at ¶¶ 68-69.

28. Although the ID concludes otherwise (see ID at ¶¶ 294, 304), the record demonstrates that Turro and MMBI lacked candor in failing to reveal the totality of their programming arrangement. Instead, they sought to conceal from the Commission the nature and extent of the control possessed and exercised by Turro. Clearly, the information concealed was both material and significant. Moreover, the reason for their concealment was that the arrangement they fashioned was not consistent with either the Letter Ruling or the

translator rules. Accordingly, consistent with the sanction imposed the Trinity Decision, *supra*, disqualification of both Turro and MMBI is warranted.

Conclusion

29. In view of Turro's unauthorized control over WJUX, coupled with Turro's and MMBI's lack of candor relative to that control, the ID should have denied Turro's applications for renewal of license and revoked MMBI's construction permit for WJUX. Alternatively, the ID should have imposed a forfeiture and ordered such steps as would ensure MMBI's control over WJUX.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau



Norman Goldstein
Chief, Complaints and Political
Programming Branch



James W. Shook
Alan E. Aronowitz
Attorneys
Mass Media Bureau

Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

October 20, 1999

CERTIFICATE OF SERVICE

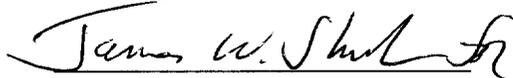
Karen Richardson, secretary of the Enforcement Division, Mass Media Bureau, certifies that she has on this 20th day of October, 1999, sent by regular U.S. mail copies of the foregoing "Mass Media Bureau's Exceptions to Initial Decision" to:

Charles R. Naftalin, Esq.
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

James P. Riley, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street, 11th Floor
Rosslyn, VA 22209

Richard A. Helmick, Esq.
Cohn and Marks
1333 New Hampshire Ave., N.W., Suite 600
Washington, D.C. 20036

Michael D. Hays, Esq.
Dow, Lohnes & Albertson
1200 New Hampshire Ave., N.W.
Washington, D.C. 20008


Karen Richardson