12 FCC Rcd 1675

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re application of	)
	)
Tsooris Corporation	)
(Assignor)	)
	)
and	)
	)
Talkline Broadcasting Corporation	)
(Assignee)	)
	)
For Assignment of License of	)
WLIR(AM), Spring Valley, New York	)

MEMORANDUM OPINION AND ORDER

Adopted: January 21, 1997 **Released: January 27, 1997**

By the Commission:

1. The Commission has before it a March 13, 1996 Application for Review and Motion for Stay, filed by Talkline Broadcasting Corp. ("Talkline"), and related pleadings.[1] Talkline seeks reversal or stay of a February 12, 1996 letter ruling by the Acting Chief, Audio Services Division, Mass Media Bureau, ("Audio Services Division letter") which found that the New York State courts had ruled that consummation of an assignment of license of station WLIR(AM), Spring Valley, New York, from Tsooris Corporation ("Tsooris") to Talkline[2] had not occurred. Consequently, the Audio Services Division letter asserted, in light of the courts' determination that there was no consummation of the assignment of license to Talkline, Tsooris remains the licensee of WLIR(AM). Further, the Audio Services Division letter stated that the license issued to Talkline was invalid and that Commission records would be updated to reflect the court's ruling and specify Tsooris as the licensee of WLIR(AM). For the reasons stated below, we deny Talkline's

[1] Tsooris filed an Opposition to the Motion to Stay on March 20, 1996 and an Opposition to the Application for Review on March 26, 1996.

[2] Application File No. BAL-930223EA.

Application for Review and dismiss its Motion for Stay as moot.[3]

2. **Background.** On April 26, 1993, the Commission granted its consent to the voluntary assignment of license of WLIR(AM) from Tsooris to Talkline.[4] By letter dated May 12, 1993, Talkline informed the Commission that, on May 10, 1993, the consummation necessary to effectuate the assignment had occurred. The Commission's computerized record system was then updated to indicate that consummation had taken place and that Talkline was the new licensee of WLIR(AM). By letter dated June 14, 1993, however, Tsooris notified the Commission that consummation had not occurred. On October 5, 1993, the Acting Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, sent both parties a letter acknowledging the controversy as to whether a "closing" of the subject assignment had, in fact, occurred. Noting that this type of controversy was not within the Commission's jurisdiction, the October 5, 1993 letter stated that, when the conflict was resolved by a local court of competent jurisdiction, "[T]he parties may then refer that court's determination as to their rights to us for any action appropriate under the circumstances." Letter to Jerome S. Boros, Esq. and Roy R. Russo, Esq., reference 1800C1-MGK. (Acting Chief, Complaints and Investigations Branch, Enf. Div., MMB, October 5, 1993). Pending the outcome of the state court litigation, no changes were made to the Commission's computerized records subsequent to the May 12, 1993 update. Accordingly, Talkline remained the Commission's licensee of record of WLIR(AM).

3. On May 27, 1994, the State of New York, County of Rockland, Justice Court, Town of Clarkstown ("Clarkstown Justice Court"), found that Talkline obtained possession of the station through "trickery" and "deceit" and that no closing had occurred. The Clarkstown Justice Court granted judgement in a warrant of eviction against Talkline. On July 13, 1994, the Supreme Court of the State of New York, Appellate Term, 9th and 10th Judicial Districts ("Appellate Term"), issued a stay of the Clarkstown Justice Court ruling pending appeal. On April 13, 1995,

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[3] See 47 C.F.R. Section 1.102(b)(3).

[4] The Commission Form 732 sent to Talkline, which is the written authorization for the Commission's consent to the assignment, states in part:

> The Commission's consent to the above is based on the representations made by the applicants that the statements contained in, or made in connection with, the applications are true and that the undertakings of the parties upon which this transaction is authorized will be carried out in good faith. The actual consummation of voluntary transactions shall be completed within 60 days from the date hereof, and notice in letter form thereof shall promptly be furnished the Commission by the buyer showing the date the acts necessary to effect the transaction were completed. . . .

the Appellate Term affirmed the Clarkstown Justice Court ruling. However, finding that "physical possession of the premises cannot be returned to petitioner [Tsooris] until the F.C.C. has been given an opportunity to pass on applications concerning the re-transfer of the broadcast license," the court stayed a warrant of eviction. Order in Case No. 94-825 Ro C, Supreme Court of the State of New York, Appellate Term, 9th and 10th Judicial Districts.

4. On May 19, 1995, a Motion for Leave to Appeal to Appellate Term was filed by Talkline, alleging that new evidence regarding Tsooris' misuse of escrow funds constituted good cause for appeal. On July 18, 1995, the Appellate Term denied Talkline's Motion for Leave to Appeal. On July 28, 1995, Talkline filed a Request for Rehearing with the Clarkstown Justice Court based on the alleged new evidence regarding the disbursement of escrow funds. On August 22, 1995, the Clarkstown Justice Court denied the Request for Rehearing. On August 25, 1995, Talkline filed a Motion with the New York Supreme Court, Appellate Division, Second Judicial Department ("Appellate Division"), seeking appeal of the April 13, 1995 Order of the Appellate Term, denying leave to appeal the Order of the Clarkstown Justice Court. On October 11, 1995, the Appellate Division denied Talkline's Motion to appeal.

5. In response to a written Commission inquiry, Talkline's New York litigation counsel stated in a November 20, 1995 letter that Talkline would not appeal the Appellate Division's October 11, 1995 decision. However, Talkline's counsel further stated that an appeal of the Clarkstown Justice Court's denial of the Request for Rehearing might be taken if a subsequent written order of that denial were to be issued. In response to a January 25, 1996 oral status inquiry by Commission staff, the Clarkstown Justice Court stated that no written order, beyond the transcript of the oral arguments, would be issued of its denial of Talkline's Request for Rehearing. On February 12, 1996, the Audio Services Division issued its letter finding that the New York Courts had determined that consummation did not occur.[5]

6. **Application for Review.** In its Application for Review, Talkline argues that the Audio Services Division letter exceeds the Commission's jurisdiction and delegated authority and is, accordingly, without legal effect. Talkline's primary contention is that the Audio Services Division letter constitutes a revocation of Talkline's license. As a revocation, Talkline argues, the Commission's action violates Section 312 of the Communications Act, 47 U.S.C. Section 312; violates the Administrative Procedure Act ("APA"), 5 U.S.C. Sections 554(e) and 558(c); and denies Talkline due process of law. Talkline further contends that a March 15, 1994 reissued

[5] Following the release of the Audio Services Division letter, Tsooris reported to the Commission, by letter dated June 25, 1996, that it had been permitted to execute the New York court dispossession order and that Tsooris has resumed possession of the station premises.

license listing Talkline as licensee of WLIR(AM) supports its assertions.[6] As there was no petition for reconsideration of the Commission's grant of the assignment application, Talkline asserts that the Commission was procedurally precluded from taking any action.

7. Further, Talkline contends that the New York courts have not finally resolved the consummation issue. Talkline states that Tsooris has been dissolved for non-payment of New York State franchise taxes and may not currently carry on broadcast business in New York State. Tsooris responds that Talkline's argument concerning Tsooris' corporate status is incorrect as a matter of law.

8. **Discussion.** In accordance with Section 310(d) of the Communications Act of 1934, as amended, the Commission must grant its consent before an authorization to use the radio spectrum is assigned from one party to another.[7] Grant of an assignment application represents the Commission's finding that the proposed transaction satisfies our rules and policies and is in the public interest. The Commission's consent permits the parties to consummate a sale, but does not compel them to do so. Notwithstanding the fact that the Commission retains exclusive authority to license broadcast stations, See 47 U.S.C. §§ 301, 303, 307, 308, 309 and 310, oftentimes we must reach a fair accommodation between our licensing jurisdiction with the power of state and local courts to adjudicate contractual disputes. See also Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 131-132 (1945); Arecibo Radio Corp., 101 FCC 2d 545, 548 (1985). Whether consummation of a Commission-approved sale occurred is a contractual issue within the province of a local court, not the Commission. See Kirk Merkley, 94 FCC 2d 829, 838 (1983), recon. denied, 56 RR 2d 413 (1984), aff'd per curium, 776 F.2d 365 (1985). The Commission can then take whatever steps are necessary to accommodate a local court's ruling on a matter

[6] The issuance of a license for WLIR(AM) naming Talkline as licensee, resulted from the following events. A March 31, 1993, letter from Tsooris' counsel advised the Commission that WLIR(AM)'s license inaccurately stated the station's authorized nighttime power. Therefore, on May 25, 1993, the Commission reissued a license for WLIR(AM), which contained technical errors. A March 8, 1994, letter from Talkline's counsel noted these errors, and requested that the license again be reissued. In addition to the technical corrections, Talkline requested that the license be issued in its name. On March 15, 1994, the license was reissued to reflect the correct technical information for the licensed facilities, with Talkline named as licensee in accordance with the then-existing computerized records. See para. 2 supra. (File No. BS-930331).

[7] Section 310(d) states, in part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby.

47 U.S.C. § 310(d).

within its jurisdiction. See Dale J. Parsons, Jr., 10 FCC Rcd 2718, 2719-20 (1995), aff'd per curium, 93 F.3d 986 (1996) (Commission corrects records to reflect a federal court ruling setting aside a sale previously approved by the Commission and putatively consummated by the parties which the court found had never been lawfully consummated); Channel 33, Inc., 64 RR 2d 1705, 1708 (1988) (Commission waives multiple ownership rules and grants assignment to qualified licensee to accommodate court order issued pursuant to bankruptcy reorganization plan); Arecibo Radio Corp., 101 FCC 2d at 548-49 (Commission waives application signature rule, 47 C.F.R. Section 73.3513, in deference to local court's ruling on contract dispute, facilitating court-approved sale to qualified licensee).

9. The Commission does not confer licensee status upon an applicant absent consummation. See Syracuse Channel 62, Inc., 60 RR 2d 1161, 1165 (1986) (assignee was not treated as a licensee for purposes of standing to file a petition to deny an application in the same market, even though assignment application was granted, because assignment was not yet consummated). Upon the determination by the New York courts that consummation did not occur, the subject assignment was rendered void ab initio, and the appropriate Commission action was the ministerial act of changing the licensee of record to comport with the court's determination. See Dale J.Parsons, Jr., 10 FCC Rcd at 2719-20, paras. 6, 9 (approving staff action correcting Commission records to comply with court determination that consummation of transfer had not occurred). Such action was appropriately taken by the Mass Media Bureau, which has delegated authority to process assignment applications pursuant to 47 C.F.R. Section 0.61(b), whether or not either party had filed a petition for reconsideration of the assignment. The action taken is consistent with precedent, as well as the October 5, 1993 letter from the Mass Media Bureau's Enforcement Division, which stated that the Commission would take appropriate action when the controversy was resolved by a local court of competent jurisdiction.[8]

10. Talkline argues that the Bureau's actions, taken pursuant to the court's determination that no consummation of the subject assignment occurred, constitutes a revocation of license. We disagree. As stated above, failure to consummate, as was determined by the state court having jurisdiction over this matter, renders the assignment void ab initio. Accordingly, Talkline is not a Commission recognized licensee with respect to WLIR(AM) and, therefore, the provisions of Section 312 of the Communications Act, 47 U.S.C. Section 312, as well as Sections 554(e) and 558(c) of the APA are not applicable. We note that the WLIR(AM) license was reissued on March 15, 1994[9] only to correct technical errors in the instrument of authorization, and the act of reissuance did not confer additional status to Talkline.

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[8] As noted by Talkline (Application, p. 9) the October 5, 1993 Enforcement Division letter was not appealed by either party.

[9] See infra, note 6.

11. Talkline's assertion that the New York courts have not resolved the question of whether a consummation occurred is at odds with the record before us. The Clarkstown Justice Court found that Talkline had deceptively obtained possession of the station and that no closing of the assignment transaction occurred. Subsequently, the Appellate Division denied Talkline's Motion for Leave to Appeal, the Clarkstown Justice Court denied a Request for Rehearing, and the Appellate Division denied leave to appeal the Order of the Clarkstown Justice Court. Furthermore, Talkline's counsel informed the staff that Talkline would not appeal the Appellate Division's decision. Despite Talkline's unsupported assertion to the contrary, since the record indicates that Talkline has filed no further appeal, we consider this matter to have been resolved by the New York courts.

12. Finally, Talkline has not demonstrated that Tsooris' tax delinquency prohibits Tsooris from operating in New York state. This is a question of state law which must be resolved by New York courts and does not affect our determination that Tsooris is the licensee of WLIR(AM).

13. Accordingly, IT IS ORDERED, pursuant to Sections 1.115(g) and 1.102(b)(3) of the Commission's Rules, 47 C.F.R. §§ 1.115(g), .102(b)(3), that the Application for Review filed March 13, 1996 by Talkline IS DENIED, the Motion for Stay filed March 13, 1996 IS DISMISSED AS MOOT and the February 12, 1996 Audio Services Division letter holding that Tsooris is the licensee of WLIR(AM) IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary