Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 9, 1993

Released: March 16, 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Weston Properties XVIII Limited Partnership
Licensee, Radio Station WKBR(AM)
20 William Street
Wellesley, MA 02181

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY for a FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

BACKGROUND

On October 22, 1991, you filed an application for assignment of license for WKBR(AM), Manchester, New Hampshire, from Weston Properties XVIII Limited Partnership ("Weston") to WKBR, Inc. (File No. BAL-911022EG). WKBR, Inc., was reported to be wholly-owned by Elizabeth Dodge. On December 2, 1991, a petition to deny the assignment application was filed by Spacetown Communications Corporation ("Spacetown") licensee of WDER(AM), Derry, New Hampshire. Spacetown sought to have the assignment application denied or designated for hearing with an issue, *inter alia,* to determine whether there had been an unauthorized transfer of control of WKBR(AM) to Brian Dodge, the husband of Elizabeth Dodge[1] Oppositions were filed by Weston and WKBR, Inc., and a consolidated reply was filed by Spacetown. On July 22, 1992, before the Commission acted on the petition to deny, you requested that the assignment application be dismissed. This was done by letter dated December 3, 1992. You now have an application pending to assign the license for WKBR(AM) to Robert Miles Bittner (File No. BAL-921030EI).

On September 20, 1991, you entered into a "Management Agreement" with Brian Dodge. You filed the Management Agreement with the Commission, pursuant to Section 73.3613 of the Commission's Rules, on October 21, 1991, the day before the application to assign the license for WKBR(AM) was filed. The initial term of the Management Agreement was from September 20, 1991, to January 20, 1992. The Management Agreement contained provisions which raised questions as to whether there had been an unauthorized transfer of control of the station. Specifically, the Management Agreement required that Brian Dodge pay you $1,275 per month as long as the Management Agreement was in effect. The Management Agreement provided that Brian Dodge would act in your best interest to:

a. Meet FCC's Public Inspection File requirement.

b. Meet FCC's Public Service Announcement requirements.

c. Meet FCC's requirement for News and Public Affairs.

d. Meet the License and operating parameters of FCC's license as granted to Owner by the FCC.

e. Be effective general manager of the station and maintain all assets used or occupied in their present working order and condition. (Contractor accepts all such assets in their "as is" condition.)

f. Do all other acts and to transact any and all business that Contractor may consider useful, necessary, or proper in connection with the management and conduct of hte [sic] business, property, and interests therein.

g. Open all operating cash accounts, utilities, and bendor [sic] service accounts in the name of Contractor and sign, accept, and endorse checks, drafts, bills in relation to the Contractor business.

h. Hire and dismiss employees as necessary in Contractor's judgement.

i. Establish main studio as required by FCC.

j. Sell radio advertising and program time and collect payment therefor.

k. Promote and conduct Public Relations for WKBR.

l. Acquire and maintenence [sic] furniture, furnishings, equipment and supplies.

m. Contract for utilities.

n. Maintain insurance programs, including policies for fire and casualty, group life, health and hospitalization insurance.

o. Take the steps needed to assure compliance with the rules, regulations, policies of the Federal Communications Commission and other government agencies.

The Management Agreement also provided that Brian Dodge would keep all of the station revenue which accrued during the time the Management Agreement was in effect. Brian Dodge was authorized to select and contract for all programs, although the Management Agreement stated that you would not be prevented from rejecting or substituting a program. Brian Dodge had the right to specify advertising rates, subject to your review. The Management Agreement specified that all employees hired would be Brian Dodge's employees and not yours. Finally, the Management Agreement contained a provision that "[n]othing in this Agreement shall serve, or shall be construed to serve, to prevent or hinder [Weston] from retaining and exercising full and complete control of the station, including but not limited to its assets, its policies and practices, its personnel, and the programming and advertising broadcast on the Station."

[1] While Spacetown sought the specification of several other issues, those issues related to Brian Dodge rather than Weston.

In your opposition to the petition to deny the assignment application, you stated that the Management Agreement was entered into with Brian Dodge in order to allow WKBR(AM), which had been silent for nine months, to resume broadcast operations. You stated that you were in dire financial circumstances and that creditors were not being paid. You also stated that some station property had been seized by creditors, that liens had been placed on some property, and that forced sales of some property had been scheduled. You also claimed that because your principals lacked broadcast management skills and funds, the only way that you could reactivate WKBR(AM) was through the Management Agreement with Brian Dodge. You further stated that you believed that Brian Dodge was an experienced broadcast operator and that he would be able to provide a religious program format on WKBR(AM). You contended that the terms of the Management Agreement provided that you would retain ultimate control over the station including its programming.

By letter dated December 9, 1992, the Mass Media Bureau requested additional information from you because of its concern that an unauthorized transfer of control of WKBR(AM) may have occurred. In response to the Bureau's letter you state that you purchased WKBR(AM) in 1987 for $1.4 million and have lost $600,000 operating the station. You indicate that WKBR(AM) went off-the-air on January 14, 1991, for financial reasons, and that despite your efforts you were unable to resume operation until the Management Agreement was entered into with Brian Dodge. One of your conditions for the Management Agreement was that you not have to expend any funds to acquire programming or to hire employees. You indicate that you approved Brian Dodge's proposed religious format, provided him with access to customer files, identified sources of services and supervised his reinitiation of technical service. Although you acknowledge that Brian Dodge performed the tasks to restore station operation, you claim that he consulted with you. You state that the Management Agreement expired on January 20, 1992, and was not extended or renewed. However, you worked with Brian Dodge for a brief period thereafter and considered hiring two people recommended by him. You did not hire any employees, and the station eventually discontinued operation in March 1992.

You claim that you maintained control of WKBR(AM) because you consulted periodically with Brian Dodge about programming decisions at the station. In addition to initially approving the religious format and the simulcasting of station WWNH(AM), you claim that you told Brian Dodge to cease broadcasting appeals for funds on the station, and to cease discussing matters raised before the FCC on the station. You state that while you maintained partnership accounts, Brian Dodge opened and controlled operating accounts for the station. You also claim that you exerted control over WKBR(AM) by investigating and coordinating the response to allegations concerning the improper use of the station's STL.[2] You claim to have maintained "periodic contact" with Brian Dodge and that you attempted to work with creditors to secure the release of certain files, equipment, leased space and other assets.

You contend in your opposition to the petition to deny that the Commission has allowed a licensee to employ a general manager who proposed to acquire control of the station based on the "dire financial condition of the station." *Fine Arts Broadcasting, Inc.*, 57 FCC 2d 108, 111 (1975). You also argue that when "exceptional and compelling circumstances" exist, a proposed purchaser may act under the supervision of a licensee to assure continued service without effectuating an unauthorized transfer of control. *Mark R. Nablone, Receiver*, 6 FCC Rcd 7529 (Vid. Ser. Div. 1991). You claim that because of your dire financial condition, you were justified in allowing Brian Dodge to operate WKBR(AM). Finally, you contend that you sought the advice of legal counsel and attempted to comply with Commission rules in connection with entering into the Management Agreement and the operation of the station.

UNAUTHORIZED TRANSFER OF CONTROL

Section 310(d) of the Communications Act of 1934, as amended, states in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, 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.

Section 73.3540(a) of the Commission's Rules states that "[p]rior consent of the FCC must be obtained for a voluntary assignment or transfer of control."

There is no exact formula by which control of a broadcast station can be determined. In ascertaining whether a transfer of control has occurred, we have traditionally looked beyond the legal title to whether a new entity or individual has obtained the right to determine the basic operating policies of the station. *See WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming and finances, is non-delegable. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981). The Commission has also discouraged prospective purchasers of a station from day-to-day participation in the station's affairs during the pendency of their applications for Commission consent, to avoid the premature assumption of control.[3] *Phoenix Broadcasting Co.*, 44 FCC 2d 838 (1973); *Fine Arts Broadcasting, Inc., supra.*

[2] From approximately September 21, 1991, until March 24, 1992, unlicensed Auxiliary Broadcast Stations operating on 947.5 MHz were used to transmit programming material between WWNH(AM) and WKBR(AM). These transmissions were made in violation of Commission rules and resulted in the imposition of a forfeiture against Harvest Broadcasting, the licensee of WWNH(AM), in the amount of $20,000.

[3] The proposed buyer, WKBR, Inc., was wholly owned by Elizabeth Dodge. However, you have conceded that her interests should be wholly attributed to her husband Brian Dodge.

Based on the information which we have before us, it appears that you effectuated an unauthorized transfer of control of the license for WKBR(AM) to Brian Dodge which lasted from September 20, 1991, until March 1992. During that time you abdicated the responsibility to determine the manner and means of operating the station. By the terms of the Management Agreement and by your own actual conduct, you turned over control of the operation of the station to Brian Dodge. In essence, you leased the license and facilities to Brian Dodge. The Commission has repeatedly held that a licensee that relegates its role to that of a lessor, retaining merely the right to approve a general format and a lessee to run the station violates Section 310(d). *Benito B. Rish, M.D.*, 6 FCC Rcd 2628 (1991); *Salem Broadcasting, Inc.*, 6 FCC Rcd 4172 (MMB 1991).

During the time Brian Dodge was operating the station you did not have any station employees and you do not know whether Dodge had any station employees. Moreover, Dodge contracted for all station services, paid all station expenses, collected all station revenue and merely paid you a monthly lease fee. As you readily admit, you entered into this arrangement because it would involve no financial responsibility on your part. In addition, Brian Dodge established the station format and provided all the programming for the station. Your acquiescence in the format choice and claimed objection to some programming broadcast by Brian Dodge does not indicate that you exercised control over station programming. Your argument that you maintained control by virtue of the Management Agreement is without merit. It is specifically contradicted by other terms in the Agreement and by the totality of circumstances including the facts that Dodge collected all the revenues, paid all the expenses, selected all the programming, and hired the employees, if any.

We do not agree with your belief that *Fine Arts Broadcasting, Inc., supra*, and *Mark R. Nablone, Receiver, supra*, sanction the unauthorized transfer of control which occurred here merely because you were having financial problems. In *Fine Arts* the Commission specifically stated that we "wish to make it clear that, in the future, prospective purchasers will not be permitted to assume managerial positions at stations they are seeking to acquire unless exceptional and the most compelling circumstances are shown." *Fine Arts Broadcasting, Inc.*, 57 FCC 2d at 111. Not only was Brian Dodge not the proposed buyer, but the Management Agreement gave him control over the station far beyond that of a general manager. Moreover, no attempt to show "compelling circumstances" was made to the Commission until after the petition to deny was filed. Finally, there was no receiver appointed by a court to run the station and insure continued operation as in *Mark R. Nablone, Receiver, supra*.

In view of the circumstances outlined above, it appears that Weston Properties XVIII Limited Partnership has violated both the Communications Act of 1934, as amended, and the Commission's rules by effectuating an unauthorized transfer of control of the license of WKBR(AM), Manchester, New Hampshire, to Brian Dodge. Pursuant to the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*Policy Statement*), *recon. denied*, FCC 92-212, released June 4, 1992, *Erratum*, released June 11, 1992, the base amount of a forfeiture for an unauthorized substantial transfer of control is $20,000. We have taken into consideration as a downward adjustment factor, the fact that you exhibited good faith when you reported the existence of the Management Agreement to the Commission as required by our rules. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, you are hereby advised of your apparent liability for a forfeiture of eight thousand dollars ($8,000) for your apparent willful violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540(a) of the Commission's Rules. As stated above, the amount specified has been reached after consideration of the factors set forth in Section 503(b)(2)(D) of the Communications Act of 1934, as amended. In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau