

1979

Tim themy v. Seagull Enterprises, Inc., A Utah Corporation, Shirley K. Watson, United Bank, A Utah Corporation, Zions First National Bank and Murray Broadcasting Company, . Inc : Brief In Answer To Petition For A Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

TIM THEM,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 SEAGULL ENTERPRISES, INC.,)
 a Utah corporation, SHIRLEY)
 K. WATSON, UNITED BANK, a)
 Utah corporation, ZIONS)
 FIRST NATIONAL BANK and)
 MURRAY BROADCASTING COMPANY,)
 INC.,)
)
 Defendants-Appellants.)

Case No. 15641

BRIEF IN ANSWER TO PETITION
FOR A REHEARING

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FILED

MAY 10 1979

Clk, Supreme Court, Utah

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Utah corporation, ZIONS FIRST)
NATIONAL BANK and MURRAY)
BROADCASTING COMPANY, INC.,)
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Defendants-Appellants.)

Case No. 15641

BRIEF IN ANSWER TO PETITION
FOR A REHEARING

Pursuant to Rule 76(e), Utah Rules of Civil Procedure, respondent Tim Themy responds to the points and authorities raised by appellants in their Petition for Rehearing and Memorandum in Support Thereof as follows:

STATEMENT OF FACTS

The facts of this case have been set forth in great detail in the earlier briefs of appellants and respondent. For purpose of this reply to appellants' Petition for Rehearing it may be sufficient to remind the Court of the following:

1. The Judgment of the Lower Court dated October 25, 1975, stated that the interests of the defendants in the real property, the personal property, and the FCC license were

forfeited. As to the FCC license, the Court stated:

The interests of defendants Seagull Enterprises, Inc., Shirley K. Watson, United Bank and Murray Broadcasting Company, Inc. in the FCC license described in and arising out of the Purchase Agreement for sale of the broadcasting equipment and license dated June 26, 1974, are forfeited by virtue of the default of the buyer thereunder. Plaintiff is the owner of said interests subject to the security interest of O. J. Wilkinson (R. 173).

2. Pursuant to the motion of plaintiff/respondent by Order dated March 17, 1978, the trial court ordered the establishment of a receivership with the receiver holding the following powers:

1. Nick Nichols is hereby appointed as the receiver of the real and personal property and of the FCC license which forms the subject matter of this litigation.

2. Said receiver shall have all authority necessary to preserve the hereinabove described assets, and to sell such assets, such powers to include, but not to be limited to the following:

a. To take transfer of the personal property and the FCC license heretofore awarded to plaintiff by this Court;

b. To notify the Federal Communications Commission of said transfer and to file all necessary applications and other documents for the obtaining of the FCC approval of the transfer;

c. To manage the KPRQ radio station in a manner consistent with FCC regulations;

d. To authorize the station managers to continue paying all proper and legitimate expenses as they come due;

e. To seek FCC approval for the transfer of the location of the station to property controlled by plaintiff in Murray, Utah.

f. To seek FCC approval for re-transfer of the broadcasting license to plaintiff, or to negotiate with prospective buyers for purchase of the license, and to perform all acts necessary to effect such transfer;

g. To obtain legal counsel in Salt Lake City and in Washington, D.C. for the purpose of obtaining transfers of the FCC license to said receiver and thereafter to plaintiff or his designee.

3. In the alternative to the establishment of the above described receivership, and at the option of defendants, Seagull, Watson, and Murray Broadcasting, said defendants may post a supersedeas bond in the amount of \$25,000, provided that the same is furnished pursuant to the provisions of Rule 73(d). If such supersedeas bond is furnished by said defendants by the _____ day of March, 1978, plaintiff's Motion for Appointment of a Receiver will be denied.
(R. 209-210)

3. Appellants appealed from the Judgment below and from the Order Appointing Receiver. In addition, appellants also moved this Court to stay the Order Appointing Receiver. On July 17, 1978, this Court denied appellants' Motion. Similarly, on April 4, 1979, this Court affirmed the decision of the lower court. The Court's decision specifically found that "[t]he appointment of the receiver in this case was clearly proper under the rules . . ." Themy v. Seagull Enterprises, Inc., et al., No. 15641, _____ P.2d _____ (Utah, April 4, 1979).

As more fully set forth below, the arguments presented by appellants in their Petition for Rehearing have been considered and rejected by this Court on two separate occasions. Appellants' Petition presents no new evidence and no new legal theories justifying a rehearing of this matter.

ARGUMENT

POINT I:

THE APPOINTMENT OF A RECEIVER BY THE LOWER COURT WAS PROPER

While apparently conceding that the Court acted properly in declaring a forfeiture of their interest in the real and personal and in the FCC license, appellants contend in their Petition that enforcement of the Court's decision by means of a receiver was improper. This contention is based upon the twin contentions that (1) appointment of a receiver impinged upon the jurisdiction of the Federal Communications Commission and (2) the establishment of a receivership went beyond the prayer of respondent's Complaint. Respondent will briefly discuss these issues.

A. The Receivership Does Not Interfere With The Authority of the Commission

Points I and II of appellants' Petition relate to the question of whether the receivership interferes with the authority of the Federal Communications Commission to authorize the transfer, assignment, or other disposition of an FCC license. Appellants' contention appears to be based upon a misreading of the nature of the Order Appointing Receiver, the text of which respondent has set forth in its Statement of Facts, supra. That Order does not require appellants to perform any act which will result in the transfer, assignment or disposition of the license. Rather, it permits the receiver to apply to the FCC for an involuntary transfer of the license and further authorizes the receiver to act as the transferee of the license in the event the transfer is approved by the Commission.

The rules of the FCC specifically provide a procedure whereby an involuntary transfer can be made to an entity appointed

by a court to succeed a prior license holder. Thus, 47 C.F.R. §1.541 states:

(a) The Commission shall be notified in writing promptly of the . . . legal disability of an individual permittee or licensee, a member of a partnership, or a person directly or indirectly in control of a corporation which is a permittee or licensee.

(b) Within 30 days after the occurrence of such . . . legal disability, an application on FCC Form 316 shall be filed requesting consent to involuntary assignment of such permit or license or for involuntary transfer of control of such corporation to a person or entity legally qualified to succeed to the foregoing interest under the laws of the place having jurisdiction over the estate involved. (Emphasis added.)

The use of a receiver to effect an involuntary transfer of an FCC license is well established in FCC practice. See, for example, In re Application of Twelve Seventy, Inc., 2 F.C.C.2d 973 (1966) and In re Application of Second Thursday Corp., 22 F.C.C.2d 515 (1970) and 25 F.C.C.2d 112 (1970). (Since the Federal Communications Commission Reports may not be available to the Court, respondent has appended copies of the foregoing cases to this Brief.) See also LaRose v. F.C.C., 494 F.2d 1145 (D.C. Cir. 1974).

Furthermore, this Court has also approved the appointment of a receiver for the purpose of obtaining an involuntary transfer of an FCC license. In Shaw v. Robison, 537 P.2d 487 (Utah 1975) one of two joint owners of a radio station petitioned and obtained from the court a receivership for the purpose of liquidating the assets of the corporation, including the FCC license. When the plaintiff subsequently requested the receiver to return the station to him and his partner the receiver refused and this

Court upheld the receiver's refusal. While the decision does not specifically address the appropriateness of the receivership; the Court's approval of the receivership as a means of effecting the involuntary transfer of the defendant's interest in the FCC license is implicit in the decision.

The foregoing authorities make it clear that appellants' argument is without merit, and that appointment of a receiver in this case does not impinge upon the jurisdiction of the Federal Communications Commission. On the contrary, the Commission and the courts have often recognized such a procedure.

B. Courts of This State May Establish a Receivership for the Purpose of Enforcing a Judgment.

Point III of appellants' Petition argues the proposition that the appointment of a receiver by the lower court was improper because a receivership was not specifically prayed for in respondent's Complaint. Such a position is untenable in light of Rules 66(a) and 69(p) which state in pertinent part:

Rule 66. Receivers.

(a) Grounds For Appointment. A receiver may be appointed by the court in which an action is pending or passed to judgment.

. . .

(3) After judgment, to carry the judgment into effect.

(4) After judgment . . . in proceedings in aid of execution when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

Rule 69. Execution and Proceedings Supplemental Thereto

. . .

(p) Appointment of Receiver. The court may appoint a receiver of the property of the judgment

debtor, not exempt from execution, and may forbid any transfer or other disposition thereof or interference therewith until its further order therein . . .

The above rules make it clear that a judgment creditor may utilize a receiver in order to collect upon his judgment. Thus, the establishment of a receivership in the instant action was in the nature of a supplemental proceeding for the purpose of enforcing respondent's judgment. Appellants are therefore clearly incorrect in asserting that such a remedy could not be granted by the Court because it was not prayed for in the Complaint. Carried to its logical conclusion, such a position would also lead to the result that a successful creditor could not obtain a Writ of Execution, an Order in Supplemental Proceedings, or a Writ of Garnishment unless he had specifically prayed for such assistance from the Court in his Complaint. Obviously such is not the practice in this state.

Furthermore, since appellants by their own admission have intermingled their own equipment with the broadcasting equipment which they obtained from respondent's predecessor, and since their operation of the KPRQ radio station is inextricably tied to use of the FCC license in dispute, it is difficult to conceive of any other device which respondent could turn to for enforcement of the lower court's judgment. It follows that the establishment of a receivership in this case was not only permissible under the Rules of Civil Procedure, it was also necessary.

POINT II:

THE ISSUES RAISED BY APPELLANTS IN THEIR PETITION WERE PREVIOUSLY CONSIDERED BY THIS COURT AND REJECTED

It is well established in this jurisdiction that to justify a rehearing it must be shown that the Supreme Court either failed to consider some material point in the case, that it erred in its conclusion, or that some matter has been discovered which was unknown at the time of the original hearing. In re MacKnight, 4 Utah 237, 9 P. 299 (1886); Brown v. Pickard, 4 Utah 292, 294, 11 P. 512 (1886).

An examination of appellants' Petition for Rehearing reveals that appellants have presented no new arguments not previously considered and rejected by this Court. Thus, for example, appellants cite Radio Station WOW, Inc. v. Johnson, 323 U.S. 120 (1945) for the proposition that the court below "invaded the exclusive jurisdiction of the FCC". (Petition, p. 5.) This very same argument was made by appellants in their Brief (Brief Appellants, pp. 23-25) and was rejected by this Court in its recent decision. In pertinent part that decision states:

The case at hand is not one in which a state court has impinged upon the jurisdiction of the FCC. The judgment simply enforces the terms of the agreements providing for forfeiture upon default by the purchaser, and declares the owner of the interest in the radio station and the license to be They. It does not require the parties to take any specific action regarding a retransfer of the license, as in Radio Station WOW, Inc. They v. Seagull Enterprises, supra.

A second and related issue raised by appellants' Petition is that the lower court's appointment of a receiver "violates the established and recognized principal of exclusive jurisdiction of the Federal Communications Commission . . ." (Petition, p. 6.) An almost identical argument was made by

appellants in their Brief where they stated:

It is well established that state court (sic) may not interfere with or compel the transfer of a duly issued and approved broadcasting license or authorized execution against the same, and the lower court improperly intruded into the exclusive jurisdiction of the Commission. (Brief of Appellants, p. 28.)

A final illustration of the fact that appellants' Petition presents no new facts or authorities can be found by comparing the heading of Point III of the Petition with statements appearing on pages 26 and 27 of appellants' Brief. The Petition states:

The Order of the lower court appointing a receiver exceeded the relief granted plaintiff-respondent by the Summary Judgment.

Similarly, the Brief states:

Additionally, the Order Appointing Receiver or in the Alternative, Setting Supercedeas Bond, far exceeds the scope of the summary judgment of forfeiture . . .

In view of the identity of arguments in appellants' Petition for Rehearing and appellants' Brief, it is obvious that this Court did not fail to consider a material issue raised by appellants earlier and that their Petition should therefore be denied.

CONCLUSION

Appellants' Petition is nothing more than a restatement of the well-worn arguments which this Court has considered and rejected. Appellants have had their days in court and should now be required to turn over to respondent that which is rightfully his. If, as appellants contend, the courts of this state have

impinged upon the jurisdiction of the Federal Communications Commission, that body can assert its prerogatives by rejecting respondent's Petition for transfer of the license in dispute.

DATED this 10th day of May, 1979.

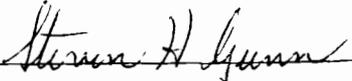
RAY, QUINNEY & NEBEKER



Steven H. Gunn
Attorneys for Plaintiff/Respondent

MAILING CERTIFICATE

I hereby certify that a copy of the foregoing Brief in Answer to Petition for a Rehearing was mailed, postage prepaid to Gary A. Frank, Attorney for Defendant/Appellants, 5085 South State, Murray, Utah 84107 on this 10th day of May, 1979.



F.C.C. 70-330

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SECOND THURSDAY CORP. (WWGM), NASH- VILLE, TENN. For Renewal of License SECOND THURSDAY CORP. (WSET-FM), NASHVILLE, TENN. For Extension of Time to Construct	}	Docket No. 17914 File No. BR-4380 Docket No. 18175 File No. BMPH- 9729
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MEMORANDUM OPINION AND ORDER

(Adopted March 27, 1970)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; AND WELLS NOT PARTICIPATING; COMMISSIONER ROBERT E. LEE DISSENTING AND COMMISSIONER COX DISSENTING AND ISSUING A STATEMENT

1. This proceeding involves applications for renewal of license of standard broadcast station WWGM at Nashville, Tenn., and for an extension of time to construct an FM station (WSET-FM) in the same city. Second Thursday Corp. is the licensee and the permittee, respectively, of the two stations. The renewal application was designated for hearing (F.C.C. 67-1327, released Dec. 29, 1967) to determine whether Second Thursday had prosecuted its application for an FM station in good faith with the intention to construct and operate, whether it possesses the requisite qualifications to be a licensee, and whether it had engaged in trafficking. A petition for reconsideration was denied by a "Memorandum Opinion and Order," 12 F.C.C. 2d 438, released April 16, 1968. Thereafter, Second Thursday's application for extension of time to construct the FM station was designated for hearing on a character issue in a consolidated proceeding with the renewal application (F.C.C. 68-483, released May 6, 1968). No hearings have been held in this proceeding.

2. On April 17, 1968, Second Thursday was made the subject of a bankruptcy proceeding and John R. Cheadle was appointed trustee in bankruptcy. Now before the Commission for consideration is the petition of the trustee for reconsideration of the designation orders and for grants of the two applications without hearing filed on July 29, 1969. The trustee takes no position with respect to the designated issues but asserts that a grant of the requested relief will serve the public interest by enabling innocent creditors to obtain at least partial payment of their claims and by allowing a prompt resumption of

22 F.C.C. 2d

service on WWGM and the institution of service on WSET-FM.¹

3. In the bankruptcy proceeding the assets of the bankrupt were sold at public auction on July 5, 1968, subject to approval of the Commission. The AM station was purchased by the estate of Percy B. Crawford, doing business as Crawford Broadcasting Co. (Crawford)² which bid \$105,000, in addition to agreeing to make arrangements with two secured creditors who have liens on the corporate assets.³ The successful bidder for the FM construction permit was William O. Barry trading as Great Southern Broadcasting Co. (Great Southern) who bid \$10,000.⁴ On July 15, 1968, the sales were confirmed by the bankruptcy court. Neither purchaser is connected with the bankrupt or its stockholders or personally has been associated with the operations of the bankrupt.

4. On September 10, 1969, the Broadcast Bureau filed a responsive pleading to the petition for reconsideration in which it interposed no objection to a renewal of the AM station license and approval of the assignment to Crawford provided the proposed assignee is found to be qualified. However, the request for an extension of the FM construction permit without hearing and approval of the assignment of the permit is opposed by the Bureau. In a statement filed September 22, 1969, the trustee renewed his request for approval of the assignment of both stations but pointed out that the two matters are separable and the disposition of one need not govern the disposition of the other. Great Southern, however, in its reply filed October 31, 1969,⁵ asserts that no valid basis exists for different treatment of the two applications and it urges that the trustee's petition be granted in its entirety.

5. The issues designated for hearing raise serious questions concerning the character qualifications of Second Thursday's principals. In these circumstances, a grant without hearing of the renewal, extension, and assignment applications pending before us may be made only if the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors. *Image Radio, Inc.*, et al., 15 F.C.C. 2d 317 (1968); *Twelve Seventy, Inc.*, et al., 2 F.C.C. 2d 973 (1966). In order to show that the bankrupt comes within the enunciated principle, the trustee has submitted a detailed statement of the pertinent facts and circumstances concerning the obligations of Second Thursday and the disposition to be made of any funds to be received in the event the proposed renewal, extension, and assignments are approved.

¹ Applications for the involuntary assignments of the AM and FM authorizations to the trustee are presently pending before the Commission (BAL-6375 and BAPH-447).

² The application for assignment of the WWGM license to Crawford, BAL-6467, was accepted for filing on Sept. 12, 1968. Thereafter the application was amended to substitute as assignee Crawford Radio Enterprises, Inc. (referred to herein as Crawford) and the amended application was accepted for filing on Aug. 19, 1969.

³ The creditors are Dr. Samuel J. Simon, the majority stockholder of Second Thursday and Radio Corporation of America.

⁴ An application for assignment of the construction permit to Great Southern (BAPH-469) was accepted for filing on Nov. 25, 1969.

⁵ Good cause has been shown for favorable action on Great Southern's petitions for extensions of time in which to file this pleading, and they will be granted.

6. Second Thursday has four stockholders: Dr. Samuel J. Simon, the majority stockholder, and Harold Seligman together own two-thirds of the outstanding shares; and Milton Hirsch and Joseph Ray⁶ own the remaining one-third. The stockholders have filed claims against the bankrupt corporation and a question to be determined is the extent to which any who may have been guilty of misconduct would share in the distribution of any funds received by the trustee as a result of the sale of the corporate assets. Despite the contentions of the trustee and the Bureau that Ray and Hirsch should be considered as innocent principals, we find no basis for distinguishing among the stockholders in determining whether alleged wrongdoers will share in the proceeds of the sale of the stations. In August 1964, Ray and Hirsch, attorneys then practicing in Columbus, Ga., each acquired an 11.1-percent interest in Second Thursday and, together with one Philip A. Meltzer, they held an option to purchase the balance of the corporate stock. All three individuals were owners of Pam Radio, Inc., licensee of WOKS at Columbus, Ga., and presumably they have some familiarity with matters pertaining to the business of broadcasting. Station WVGW was placed on the market for sale during the latter part of 1965, but when in January 1966, the competing applicant for the FM station, Central Broadcasting Corp., charged that this evidenced a lack of intention on the part of Second Thursday to construct and operate the station, the AM station was withdrawn from the market. In answer to Central's charges, Second Thursday represented to the Commission that it intended to construct and operate the FM station if granted the permit irrespective of what it might do with the AM station.

7. During this period Ray and Hirsch could not have been completely out of contact with the majority stockholders since, as of May 1966, negotiations were pending for the acquisition of the 500 shares owned by Ray, Hirsch, and Meltzer and the purchase of 749 shares by two other individuals.⁷ Instead, however, Ray and Hirsch thereafter acquired Meltzer's stock interest so that they became the owners of one-third of Second Thursday's outstanding shares. Second Thursday paid the competing applicant almost \$6,000 in June 1966 as reimbursement for expenses, and the competing application was dismissed pursuant to an agreement between the parties;⁸ the "Initial Decision" (F.C.C. 66D-54) awarding the construction permit to Second Thursday was released August 30, 1966, and became final on October 19, 1966; and on April 5, 1967, a contract was executed for the sale and assignment to Apex Communications Corp. of both the AM and the FM stations. The alleged misrepresentations were made in connection with the prosecution of the FM application, and the award of the construction permit accrued to the benefit of all the stockholders of Second Thursday. Our determination must be made in the light of this information, much of which is derived from the pleadings and documents submitted by Second Thursday and its principals.

⁶ Mr. Ray is deceased and this stock is now held by his estate.

⁷ This information is contained in an affidavit executed on May 18, 1966, by Harold Seligman, Secretary-Treasurer of Second Thursday.

⁸ By "Memorandum Opinion and Order," F.C.C. 66 R-306, released Aug. 9, 1966, the joint request for approval of the agreement was granted by the Review Board.

8. It may be that a hearing will clear Ray and Hirsch or all of the stockholders of any wrongdoing, but our disposition of the petition for reconsideration must be made without the benefit of a hearing record. Furthermore, the critical consideration is not, as the Bureau urges, that "there is nothing to indicate Messrs. Hirsch and (the estate of) Ray participated actively in the prosecution of the FM application * * *" but whether the pleadings and other information presently before the Commission are sufficient to support an affirmative finding without hearing that neither Ray nor Hirsch participated in or acquiesced in any misconduct. In view of the matters detailed above and the sequence in which they occurred, an insufficient basis exists for an affirmative finding that Ray and Hirsch, or either of them, had no part in and were unaware of the occurrence of any of these events and their purpose, and that they were innocent of any wrongdoing. *Twelve Seventy, Inc.*, 2 F.C.C. 2d 973, 976, where, on the basis of the pleadings filed, the Commission was able to make the affirmative finding that neither of two named principals were guilty of any misconduct which would make their benefiting from a renewal of the station license inconsistent with the public interest is therefore inapposite.

9. On February 5, 1969, the bankruptcy court found that \$40,960 loaned by Dr. Simon, and \$6,230 owed to Mr. Seligman represent valid and allowable claims. However, the stockholders have agreed to forego these particular claims and have requested that any payments with respect thereto which would accrue to them by reason of the sale of the bankrupt's assets be distributed to other creditors. It further appears that Dr. Simon is one of the two secured creditors with whom Crawford is required to negotiate a settlement under the terms of the bankruptcy sale (par. 3, supra). This principal was the guarantor on loans to the bankrupt from Associates Capital Corp. in excess of \$40,000 and he succeeded to the corporation's lien on the bankrupt's assets when he was obliged to make good on the guaranty. Initially, Crawford agreed to pay \$1,000 for the release of this claim conditioned upon the acquisition of the AM station. However, Dr. Simon has now agreed to waive this payment and release his lien on the bankrupt's assets if the trustee's petition for renewal and assignment of the AM license is granted. Unquestionably, the principals of Second Thursday have sustained substantial losses in connection with the operation of the AM station. Nevertheless, we hold that, in determining whether the public interest would be served by favorable action on the applications before us, the extent of the losses sustained by the principals of the licensee has no decisional significance. Our primary concern here is whether substantial equities exist in favor of innocent creditors and whether such equities outweigh any benefit which might accrue to the licensee's principals as a result of the renewal and assignment of license. Should it appear that alleged wrongdoers would be benefited substantially by reason thereof, favorable action would not be warranted. In view of the foregoing, we must scrutinize the proposed transactions carefully in order to ascertain whether any prin-

cipals charged with misconduct will derive such a substantial benefit as to preclude a grant of the trustee's petition.⁹

10. The real property upon which the radio towers and transmitter are located is owned by the Hyde's Ferry Fund, which is an irrevocable trust established in 1963 by Dr. Simon for the benefit of his children. If the assignment of the AM station is approved, Crawford will pay the fund \$48,000, less a \$4,000 sales commission, for the approximately 6 acres now under lease pursuant to an option to purchase in the 1963 lease agreement. In addition, Crawford has agreed to pay \$15,000 for approximately 3¾ acres of land adjacent thereto which is owned by Dr. Simon. An appraisal from a real estate broker submitted with the petition indicates that the land is worth \$4,000 per acre.

11. At the time the trustee's petition was submitted, there was nothing before us to indicate that a different value should be placed upon the Hyde's Ferry Fund land than upon Dr. Simon's adjoining land which was appraised at \$4,000 per acre. Consequently, it appeared that the \$44,000 payment to the fund may have constituted a windfall of approximately \$20,000 for the beneficiaries who are the children of the majority stockholder, and that such payment would represent a substantial benefit to a principal who is charged with serious misconduct. We therefore requested the trustee and the other parties to provide additional information in order to enable us to reach a determination. From the pleadings and affidavits submitted, including an estimate from a construction and paving company, it appears that a concrete block building and certain wood structures located on the property, grading, installation of a water line and other specified improvements are worth in excess of \$26,000. Thus, there is a reasonable basis for a finding that the realty and the improvements thereon are worth the amount being received by the Hyde's Ferry Fund and that the transaction is not the benefit to the majority stockholder which it appeared to be.

12. Radio Corporation of America holds a lien on WWGM's transmitter, towers, and other technical equipment, and it filed a claim against the bankrupt for over \$50,000. Crawford has agreed to pay and the creditor has agreed to accept \$20,000¹⁰ in settlement of this claim. Other secured claims against the bankrupt estate total \$31,531.26, the principal creditors being the Internal Revenue Service (\$28,460.76) and the State of Tennessee (\$2,363.50).¹¹ Unsecured claims total \$121,942.79. Of this latter amount the sum of \$34,611.39, which was due to the Third National Bank, was paid by Simon (\$12,111.39), Hirsch and Ray (the remaining \$22,500) who are now subrogated to the bank's claim. Also, the sum of \$7,800 is due the Hyde's Ferry Fund for unpaid rent on the property occupied by the radio station's towers and transmitter. Thus the unsecured claims held by creditors who are wholly

⁹ By letter dated Nov. 17, 1969, the chief, Office of Opinions and Review of the Commission requested the trustee to submit additional information, and other parties were afforded an opportunity to file responsive comments. Pursuant to this request letters were submitted by the trustee and by other parties. On Feb. 5, 1970, a conference was held by the chief, Office of Opinions and Review with all parties and, thereafter, the parties submitted additional information. In this memorandum opinion and order we have taken into account the information and representations contained in the submissions of the parties.

¹⁰ This sum is in addition to the \$105,000 Crawford is to pay for the AM station (par. 3. *supra*).

¹¹ Costs and expenses of the bankruptcy proceeding are estimated at \$10,000.

unrelated to and unassociated with the stockholders total \$79,531.40. Of this amount, however, Dr. Simon is liable through endorsements or guaranties for \$11,091.¹² This leaves \$68,440.40 of unsecured claims by persons unassociated with the bankrupt or its principals which would not be paid if the renewal hearing results in a decision adverse to the licensee. Accepting the trustee's estimate that approval of the assignments of both the AM and FM stations will permit a 60.41 percent recovery on unsecured claims, it appears that unsecured creditors having no connection with the principals of the bankrupt will receive approximately \$41,344.85 which otherwise may be lost.

13. We recognize, of course, that the sizable amounts which would be received by innocent creditors, both secured and unsecured, the resumption of broadcast service on WWGM and the commencement of service on WSET-FM are favorable public interest considerations which support a grant of the trustee's petition. Nevertheless, the fact that a large proportion of the \$115,000 to be paid for the AM and FM stations will accrue to the benefit of three of the stockholders of Second Thursday must be accorded significant decisional weight. Dr. Simon will receive \$7,316.49 by reason of his subrogation to the Third National Bank's claim and he will be relieved from paying approximately \$6,700.07 on his contingent liability to creditors.¹³ Ray and Hirsch will recover \$13,592.25 through subrogation to the claim of the bank.¹⁴ Therefore, directly or indirectly, the stockholders will benefit to the extent of over \$27,500 or more than 23 percent of the total amount to be received for both facilities. This is far more than a minor benefit for principals of a licensee and a permittee who are charged with making material misrepresentations to the Commission. In fact, we find that the possible wrongdoers will receive a substantial benefit from the proposed assignments of the WWGM license and the FM permit, even excluding the sums to be received by the Hyde's Ferry Fund. On balance we conclude that the public interest would not be served by allowing the principals of Second Thursday to receive so large a share of the proceeds of the sale of the broadcast facilities until a hearing is held and they are absolved of any wrongdoing.

14. In view of our determination that a hearing is necessary on the applications for renewal of the AM license and the extension of the FM permit, we do not reach the question of whether Crawford or Great Southern is an acceptable assignee or whether either assignment application is deficient in any material respect. It should be noted, however, that favorable action on the said applications and the assignments of the license and the permit to the trustee would be taken only in conjunction with the approval of assignment applications to acceptable assignees. *Twelve Seventy, Inc., et al.*, 2 F.C.C. 2d 973, 976 (1966). Therefore, while we shall continue with the processing of the assign-

¹² Adelaide Waller, \$1,200; Arnold & Porter, \$1,891; Apex Corp., \$5,500; and Kraft & Associates, \$2,500. It appears that Apex Corp. advanced the funds which were used to reimburse Central Broadcasting for expenses incurred in the prosecution of its FM application. We cannot ascertain from the information now before us whether the Apex Corp. is the same as the Apex Communications Corp. which contracted in April 1967 to purchase the AM and FM stations. See par. 7, supra.

¹³ Of course, he will be required to pay the \$4,300.93 balance toward the claims which total \$11,091.

¹⁴ On the bank claim, Dr. Simon will lose \$4,794.90; and Ray and Hirsch will lose \$8,907.75.

ment applications, final action with respect thereto will be held in abeyance until the hearing issues in this proceeding are resolved.

15. For the reasons set forth above, we have concluded that the petition for reconsideration filed by the trustee must be denied and that a hearing is necessary on the application for extension of time to construct the FM station as well as on the application for renewal of the AM station license. However, in view of the pendency of the bankruptcy proceeding and the public interest in the issuance of a decision at the earliest possible time, we shall direct that the hearing be expedited.

16. Accordingly, *It is ordered*, That the petition for reconsideration filed on July 29, 1969, by John R. Cheadle, trustee in bankruptcy for Second Thursday Corp., *Is denied*.

17. *It is further ordered*, That the petitions for extensions of time to file a responsive pleading filed by William O. Barry, trading as Great Southern Broadcasting Co. on October 9, 1969, and October 17, 1969, *Are granted*, and the pleading submitted October 31, 1969, *Is accepted* for filing.

18. *It is further ordered*, That the hearing examiner *Is directed* to conduct the hearing in this proceeding expeditiously and that he shall prepare and issue the initial decision as promptly after the close of the record as possible, consistent with the requirements of due process.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

DISSENTING STATEMENT OF COMMISSIONER KENNETH A. COX

I dissent. I think the majority's action takes a good principle and pushes it to such a ridiculous extreme that the result seems to me to fly in the face of commonsense, justice, and the public interest standard we are supposed to administer.

I agree fully that we should not allow licensees who have seriously violated our rules and policies to avoid penalty for their misdeeds either by selling their stations or, if their operations have gone into bankruptcy, by salvaging all, or nearly all, of their investment. The public interest is served by imposing sanctions on such offenders, and by the example this sets for others who might be tempted to engage in improper practices in the expectation that they probably won't be caught, but that if they are they can walk away from the situation without loss—or even with a handsome profit. But the public interest must also take account of the audience of the station and, where the station is in financial difficulties, its creditors as well.

On the facts of this case, I think a balancing of these elements of the public interest would best be served by granting reconsideration and authorizing renewal of the license of WWGM and extension of time to construct WSET-FM, all on the condition that the transfers to Crawford Radio Enterprises, Inc., and Great Southern Broadcasting Co.—which should be approved at the same time—are promptly consummated. This result would eliminate from the picture all those in any way responsible for the alleged misrepresentations to the Commission, and would leave them with very substantial financial losses as sanctions

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F.C.C. 70-892

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

<p>In Re Applications of SECOND THURSDAY CORP. (WWGM), NASHVILLE, TENN. For Renewal of License SECOND THURSDAY CORP. (WSET-FM), NASHVILLE, TENN. For Extension of Time To Construct SECOND THURSDAY CORP. (ASSIGNOR) AND JOHN R. CHEADLE, TRUSTEE IN BANKRUPTCY (ASSIGNEE) For Involuntary Assignment of License of Station WWGM, Nashville, Tenn. JOHN R. CHEADLE, TRUSTEE IN BANKRUPTCY (ASSIGNOR) AND CRAWFORD RADIO ENTERPRISES, INC. (ASSIGNEE) For Assignment of License of Station WWGM, Nashville, Tenn. SECOND THURSDAY CORPORATION (ASSIGNOR) AND JOHN R. CHEADLE, TRUSTEE IN BANKRUPTCY (ASSIGNEE) For Involuntary Assignment of Construction Permit of Station WSET-FM, Nashville, Tenn. JOHN R. CHEADLE, TRUSTEE IN BANKRUPTCY (ASSIGNOR) AND WILLIAM O. BARRY, TRADING AS GREAT SOUTHERN BROADCASTING CO. (ASSIGNEE) For Assignment of Construction Permit of Station WSET-FM, Nashville, Tenn.</p>	<p>Docket No. 17914 File No. BR-4380</p> <p>Docket No. 18175 File No. BMPH-9729 File No. BAL-6375</p> <p>File No. BAL-6467</p> <p>File No. BAPH-447</p> <p>File No. BAPH-469</p>
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MEMORANDUM OPINION AND ORDER

(Adopted August 26, 1970; Released August 31, 1970)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSIDENTING; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The background of this consolidated proceeding and the numerous pleadings which have been directed to the Commission in connection therewith have been set forth in our Memorandum Opinion and Order, 22 FCC 2d 515, released April 6, 1970 disposing of a petition for reconsideration filed by John R. Cheadle, Trustee in Bankruptcy

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of Second Thursday Corporation. Now before the Commission for consideration is another petition for reconsideration and for a grant without hearing filed by the Trustee.¹

2. In our April 6, 1970, Memorandum Opinion and Order, *supra*, we denied the prior petition of the Trustee for a grant of the pending applications without hearing because possible wrongdoers might be benefited substantially thereby and such a benefit would be inconsistent with the public interest (22 FCC 2d at 520). The Trustee's latest petition is predicated upon further concessions by the principal stockholders of the bankrupt corporation who now propose to waive all claims as creditors of the corporation and to authorize the distribution to the remaining creditors of the proportionate share of the bankrupt's assets to which they would be otherwise entitled by reason of such claims. In situations of the type under consideration, the trustee in bankruptcy and the principals of the bankrupt should make every effort in their initial proposal to go as far as possible toward the elimination of any significant benefits to alleged wrongdoers from a grant by the Commission of the relief requested. By so doing, the delay in the disposition of the trustee's request, such as that which has occurred in this case, will be avoided.

3. By reason of their subrogation to the claim of the Third National Bank (par. 13, 22 FCC 2d at 520), Dr. Samuel J. Simon, the majority stockholder of Second Thursday, and Milton Hirsch and the Estate of Joseph Ray, owners of one-third of the outstanding shares, have filed claims as creditors of the bankrupt corporation in the amount of \$34,611.39. Submitted with the latest pleading filed by the Trustee are waivers executed by all three stockholders of their rights to share in the corporate assets on the basis of their claims as creditors. As a result, the amount available for distribution to creditors who are wholly unrelated to and unassociated with the stockholders will be increased and an analysis of the new factual situation is necessary to a determination of the merits of the pending petition.

4. Certain factors remain unchanged. Upon approval of the renewal, extension of permit, and assignment applications, Radio Corporation of America will receive \$20,000 in satisfaction of its \$50,000 claim against the bankrupt and for the release of its lien on certain corporate equipment. In addition, the Trustee will receive \$105,000 from the proposed assignee of the WWGM license and \$10,000 from the proposed assignee of the WSET-FM construction permit. Secured creditors will receive \$31,531.26 which will satisfy their claims in full. The significant changes effected by the Trustee's latest pleading and the attachments thereto are that the total sum due to unsecured creditors who will share in the distribution of the bankrupt's assets is reduced to \$87,331.40, and no part of the proceeds derived from the sale of the AM and FM stations will be paid to any stockholder in satisfaction of his claim as a creditor. Thus, assuming administration expenses of \$10,000 as estimated by the Trustee, \$73,648.20² will be

¹ This pleading was filed on June 9, 1970. Also before the Commission are the comments of the Broadcast Bureau filed June 12, 1970, and the reply comments of the Trustee filed June 22, 1970. By an Order, FCC 70-687, released July 7, 1970, we stayed the hearing in this proceeding pending disposition of the Trustee's petition for reconsideration.

² This figure includes the \$179.46 which the bankrupt estate has in cash.

available for distribution to unsecured creditors who will therefore receive approximately 84 percent of their claims.³

5. Although no stockholder will share directly in the distribution of the funds derived from the sale of the AM and FM stations, the question remains whether a possible wrongdoer will be indirectly benefited by approval of the pending applications to a degree which outweighs the factors favoring such action. The Hydes Ferry Fund, an irrevocable trust established by Dr. Simon in January, 1963, for the benefit of his children, has filed a claim in the sum of \$7,800 for unpaid rent on property owned by the Fund and leased to the AM radio station for its towers and transmitter. According to the Trustee's petition, the Fund cannot waive the rental claim without a court order. Taking into account the circumstances that the Fund was established many years before the institution of the bankruptcy proceeding, that payment will be made to the Fund which appears to have given fair consideration for the amount due, and that the beneficiaries had no connection with any alleged wrongdoing, we do not believe that a grant of the Trustee's petition is precluded merely because the beneficiaries of the Fund are children of the bankrupt's principal stockholder.

6. More troublesome, however, is the fact that Second Thursday's principal stockholder, Dr. Simon, will be relieved from paying approximately \$9,316 of the \$11,091 in accounts which he has guaranteed. While it is an indirect benefit, a reduction in losses is nevertheless a benefit which must be considered in determining whether the public interest will be served by a grant of the applications pending before us.

7. In our view, the public interest considerations favoring a grant of the Trustee's petition outweigh any unfavorable considerations. Assuming that the proposed assignee for the AM facility is qualified and the application otherwise meets the Commission's public interest standards,⁴ secured and unsecured creditors will receive approximately \$115,000, most of which will be lost if the renewal application is denied. An additional \$10,000 will become available to unsecured creditors upon approval of the extension and assignment applications pertaining to the FM station. No part of the proceeds from the sale of the stations will be paid to any of Second Thursday's stockholders; and, by reason of their waivers, the proportionate share of the corporate assets which the stockholders would have received on the basis of claims approved by the Bankruptcy Court will be distributed to other creditors. Considering all of the foregoing circumstances, we are persuaded that the indirect benefit resulting from the \$9,316 reduction in the sizeable losses sustained by the stockholders of Second

³ In his petition for reconsideration, the Trustee states that by reason of the protracted nature of this proceeding administration expenses might be higher. However, in view of the Trustee's representations, we are assuming that the increase will not be so great as to affect substantially the estimated 84 percent settlement for unsecured creditors.

⁴ In accordance with the consistent policy followed by the Commission, favorable action on the Trustee's request for renewal of the WWGM license or for an extension of time to construct WSET-FM will be taken only in conjunction with our approval of an assignment to an acceptable assignee for the particular facility. *Twelve Seventy, Inc., et al.*, 2 FCC 2d 973, 976 (1966).

Thursday⁶ is outweighed by the substantial equities in favor of innocent creditors and the public interest in the resumption of service on WWGM. We conclude therefore that, conditioned upon an assignment to an acceptable assignee, the public interest will be served by a grant without hearing of the application for the renewal of WWGM's license. Likewise, with respect to the FM facility, the commencement of service on WSET-FM and the equities in favor of Second Thursday's unsecured creditors are additional factors which justify favorable action on Trustee's petition for reconsideration and we conclude that the public interest will be served by a grant of the application for an extension of time to construct provided the permit is assigned to an acceptable assignee.

8. Processing of the application for assignment of the WWGM license (BAL-6467) has been completed. The proposed assignee is Crawford Radio Enterprises, Inc., the stockholders of which are members of the Crawford family.⁶ The assignee is legally, technically, financially, and otherwise qualified, and we find that a grant of the application will serve the public interest, convenience, and necessity.⁷

9. The proposed assignee of the FM construction permit is William O. Barry, tr/as Great Southern Broadcasting Company (BAPH-469). Additional information has been requested from Great Southern in connection with pending assignment application but the requested information has not as yet been received. Until the requested information is supplied, we cannot continue with the processing of the application or make a determination concerning the proposed assignee's qualifications to be a Commission permittee or licensee. For this reason further action on the extension application relating to the FM station will be deferred until processing of the application for assignment to Great Southern is completed. However, the AM and FM matters are separable and there appears to be no valid reason for deferring disposition of the applications relating to the AM station until final action is taken on the FM applications. On the contrary, we find that the benefit to the public from the resumption of service on WWGM at the earliest possible time and the equities in favor of Second Thursday's creditors require that the disposition of the AM applications not be further delayed.

10. Accordingly, IT IS ORDERED, That the Further Petition for Reconsideration filed June 9, 1970 by John R. Cheadle, Trustee in Bankruptcy of Second Thursday Corporation IS GRANTED insofar as the requests therein contained relate to standard broadcast station WWGM at Nashville, Tennessee; and action thereon IS DEFERRED insofar as the requests relate to FM station WSET-FM at Nashville, Tennessee.

⁶It appears that in addition to other losses sustained by the stockholders of the bankrupt corporation, Dr. Simon was required to make good on his guaranty to Associates Capital Corporation for a corporate loan of over \$40,000; and this claim likewise has been waived by Dr. Simon (22 FCC 2d at 518, par. 9).

⁷Ruth Crawford Porter (35%); Donald B. Crawford (13%); Richard Crawford (13%); Dan B. Crawford (13%); Dean A. Crawford (13%); and Donna Lee Crawford (13%).

⁸The application for involuntary assignment of license from Second Thursday to John R. Cheadle, Trustee in Bankruptcy (BAL-6375) is also consistent with the public interest and it will be granted.

11. IT IS FURTHER ORDERED, That the application for renewal of license of station WWGM (BR-4380) at Nashville, Tennessee IS GRANTED.

12. IT IS FURTHER ORDERED, That the application for consent to involuntary assignment of the license of station WWGM from Second Thursday Corporation to John R. Cheadle, Trustee in Bankruptcy (BAL-6375), IS GRANTED.

13. IT IS FURTHER ORDERED, That the application for consent to voluntary assignment of the license of station WWGM from John R. Cheadle, Trustee in Bankruptcy, to Crawford Radio Enterprises, Inc. (BAL-6467) IS GRANTED.

14. IT IS FURTHER ORDERED, That decisions on the application for extension of time to construct station WSET-FM at Nashville, Tennessee (BMPH-9729), the application for consent to involuntary assignment of construction permit of station WSET-FM from Second Thursday Corporation to John R. Cheadle, Trustee in Bankruptcy (BAPH-447), and the application for consent to voluntary assignment of construction permit of station WSET-FM from John R. Cheadle, Trustee in Bankruptcy, to William O. Barry, tr/as Great Southern Broadcasting Company (BAPH-469) ARE DEFERRED until processing of the voluntary assignment application (BAPH-469) is completed and pending further order of the Commission.

15. IT IS FURTHER ORDERED, That the hearing in Docket No. 17914 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

25 F.C.C. 2d

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

FCC 66-255

WASHINGTON, D.C. 20554

In re Applications of
TWELVE SEVENTY, INC.
For Renewal of License of Station WTID,
Newport News, Va.

Docket No. 15983
File No. BR-1749

TWELVE SEVENTY, INC. (ASSIGNOR), AND DAVID
N. MONTAGUE, TRUSTEE IN BANKRUPTCY (AS-
SIGNEE)

File No. BAPL-340

For Involuntary Assignment of License
and Construction Permit of Station
WTID, Newport News, Va.

DAVID N. MONTAGUE, TRUSTEE IN BANKRUPTCY
(ASSIGNOR), AND BIG T CORP. (ASSIGNEE)

File No. BAPL-341

For Assignment of License and Construc-
tion Permit of Station WTID, New-
port News, Va.

MEMORANDUM OPINION AND ORDER

(Adopted March 16, 1966)

BY THE COMMISSION: COMMISSIONERS HYDE AND BARTLEY CONCURRING
IN THE RESULT; COMMISSIONER LOEVINGER ABSENT.

1. This proceeding concerns the application filed July 26, 1963, for renewal of license of standard broadcast station WTID, Newport News, Va., operating daytime on the frequency 1270 kc with power of 1 kw. A brief résumé of the history of this proceeding will be helpful in considering the problems presented herein.

2. The application for renewal was executed by Max Reznick as president-treasurer of Twelve Seventy, Inc., the licensee of station WTID. On December 3, 1963, the licensee corporation filed a petition in the U.S. District Court for the Eastern District of Virginia, alleging that it was insolvent and requesting relief under chapter X of the Bankruptcy Act. The petition was approved on December 10, 1963, and the court permitted the debtor to continue in possession of the station. However, in an order dated September 18, 1964, the court stated that "consummation of the plan of said debtor will require the appointment of a trustee herein and the removal of the debtor from possession of his property." David N. Montague was appointed trustee of the debtor and, with certain exceptions not material here, the trustee was authorized to "exercise all the authority possessed by a receiver in equity, and a trustee in bankruptcy" in the conduct of the debtor's business.

3. Thereafter, on December 7, 1964, Montague (hereafter trustee) tendered for filing an application (FCC form 316) for involuntary assignment of the station license from Twelve Seventy to himself as

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trustee. No action has been taken with respect to this assignment application. However, by order, FCC 65-349 released May 3, 1965, the renewal application was designated for hearing to determine, *inter alia*, whether the licensee, Twelve Seventy, Inc., possesses the character qualifications to be a licensee of the Commission. On June 3, 1965, the trustee filed a petition for substitution as the principal party or, in the alternative, for leave to intervene and, by order, FCC 65M-752, released June 11, 1965, the Chief Hearing Examiner granted the petition to intervene with authority "to participate in all aspects of this proceeding in the capacity of intervenor."

4. On June 1, 1965, the trustee petitioned for reconsideration of the Commission's designation order and for a grant without hearing. He alleged that he had no knowledge of the matters recited in the designation order and could not meet the burden of proof under the issues set for hearing; that innocent creditors would suffer if the license were not renewed; and that the Commission should therefore set aside its hearing order, grant the trustee's application for involuntary assignment of license, and grant the renewal application. In a memorandum opinion and order, FCC 65-833, 1 F.C.C. 2d 965, released September 30, 1965, the Commission denied the petition, stating that the conduct of the principals of WTID during the preceding license period must be explored in an evidentiary hearing before a determination could be made as to whether the public interest would be served by a grant of the renewal application, and that "a denial of the renewal application may be required despite any resultant financial loss to the creditors of the station."

5. At prehearing conferences held in this case, the trustee stated that he did not know whether or not the charges set forth in the designation order were true; that the principals of WTID had refused to cooperate with him; and that he had no intention of making any evidentiary showing under the issues framed by the Commission.¹ He further stated that his "position has been equivalent to a demurrer in a court of law, in that I have said that either true or not, they are beside the point as the matter now stands (Tr. 37). The Broadcast Bureau then moved to hold the applicant in default for failure to prosecute the renewal application, and the hearing examiner granted the motion at the prehearing conference. Thereafter, in an initial decision (FCC 65D-44) released October 19, 1965, the hearing examiner held that the failure of the licensee or the trustee on its behalf to proceed with the introduction of evidence on the designated issues "leaves no alternative but to deny the subject application," and he issued an order of denial for failure to prosecute.

6. On October 13, 1965, the trustee appealed from the adverse ruling of the examiner and on October 29, 1965, the trustee filed exceptions to the initial decision of the hearing examiner. The Broadcast Bureau has filed responsive pleadings both to the appeal and to the exceptions.²

¹ The trustee did indicate, however, that if a hearing were held, he would attempt to meet the issues relating to an alleged stock purchase option in favor of Mr. George Dall since it was based on information supplied by the trustee to the Commission.

² The Broadcast Bureau's reply to the exceptions was filed 1 day late and a petition has been filed to accept such late filed pleading. No objection has been interposed by the trustee and the petition will be granted.

The contentions of the parties with respect to both the appeal and the exceptions are essentially the same, and will, therefore, be considered together.³

7. The trustee maintains that since the principals of Twelve Seventy presently have no connection with the operation of the station and would have no connection with its operation in the future in the event of a transfer of the license to the Big T Corp., no interest of the public would be served by a hearing concerning the character qualifications of the principals of Twelve Seventy. On the contrary, he asserts that the public interest would be served by a grant of the renewal application and by approval of the assignment so that innocent creditors may receive a more substantial payment in satisfaction of their claims. Although we rejected this contention in our memorandum opinion and order, supra, denying the trustee's request for a grant without hearing, renewal cases where the applicants are involved in bankruptcy proceedings have caused us no little concern. Recently we had occasion to consider this problem in connection with an application for renewal of license of station WIGL, Superior, Wis. The licensee, who had been guilty of misconduct reflecting adversely on his character qualifications, was adjudicated a bankrupt after the filing of the application for renewal and the trustee in bankruptcy desired to dispose of the station so that the proceeds of a sale could be distributed to creditors. In a memorandum opinion and order, FCC 66-183, released March 1, 1966, we stated:

* * * Radio Superior is no longer a debtor-in-possession undergoing a voluntary arrangement with creditors under chapter XI of the Bankruptcy Act. It has been adjudicated bankrupt and is being liquidated by the trustee. Neither Haig nor Radio Superior, Inc., owns the broadcast equipment and antenna site of WIGL. In short, Haig is no longer associated with the station and is not receiving any compensation or benefit from the proposed transfer. Therefore, this is not a case in which a licensee who is guilty of misuse of a license or other misconduct attempts to transfer the license to avoid the consequences of his acts. No public interest would be served by a hearing on the qualifications of Haig or his right to a renewal of license. In reaching this conclusion, we do not intend, thereby, to abandon the Commission's basic policy that consent to an assignment or a transfer of control of a licensee is contingent upon a finding that the licensee is qualified to receive a renewal.⁴ However, where the licensee is in the hands of a trustee in bankruptcy and is already in the process of liquidation, strict enforcement of the policy will not serve the public interest.

³ *WOKO, Inc. (WOKO)*, 3 R.R. 1061 (1947); *G. A. Richards*, 5 R.E. 1292 (1950).

8. We believe that disposition of WTID's renewal application should be reconsidered in the light of the new policy enunciated in *WIGL*. The chapter X reorganization proceedings and the subsequent appointment of a trustee when the debtor was removed from possession occurred after the filing of the renewal application. The station has been operated by the trustee since September 1964 and no improper conduct occurred during the period that station affairs were under his supervision. Only two individuals, Morris Silberman and George Dail, who are named in the designation order as having been associated with the licensee during the period that certain misconduct is alleged to have occurred, will benefit as creditors from the sale of the station as a going business. However, it does not appear that either individual engaged in any activities which reflect adversely on his

⁴ Pursuant to sec. 1.291(a)(1) of the rules, the appeal, as well as the exceptions to the Special Decision, are referred to the Commission for determination. Digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library. 2 F.C.C. 2d
Machine-generated OCR, may contain errors.

character. Thus, it is alleged in 1962, Max Reznick, then the president and principal stockholder of the licensee, made Silberman a director of Twelve Seventy⁴ without reporting this fact to the Commission, but there is no indication that Silberman committed any improper act or willfully or knowingly concealed any information from the Commission. Dail became president and general manager of WTID in August 1963⁵ and it is charged that Reznick at that time relinquished control of WTID to him in contravention of section 310(b) of the Communications Act of 1934, as amended. Again, the misconduct charged is that of Reznick and there is no indication that Dail was responsible for this situation. There are, however, other allegations in the designation order which concern the conduct of Dail more directly. It is alleged therein that Dail exercised an option to purchase stock of Twelve Seventy owned by Reznick and that the exercise of such stock option was not disclosed to the Commission. These allegations are based solely upon information submitted to the Commission by the trustee and, in an affidavit executed May 28, 1965, the trustee asserts that as a result of his further investigation he has ascertained that he was in error concerning the exercise of the stock option and that the transfer of stock previously reported by him had not taken place. We are satisfied that these charges cannot be sustained and that neither Dail nor Silberman were guilty of any misconduct which would make their benefiting from a renewal of the station license inconsistent with the public interest. The incorporators and the original stockholders of the licensee were guilty of serious misconduct but they have not been associated with the operation of the station since the trustee assumed responsibility for station operations, and none of them will derive any benefit from the proposed transfer. Under the circumstances, we believe that the public interest will be better served by the acceptance and approval of the application for involuntary assignment to the trustee, a renewal of WTID's license, and an assignment of the license to an acceptable assignee.

9. Section 309(b) of the Communications Act of 1934, as amended, provides that no application for voluntary assignment of a station license may be granted until the expiration of a 30-day period following the issuance of a public notice by the Commission of the acceptance for filing of such application. We are therefore precluded from acting at this time on the request for approval of the assignment of station license to the Big T Corp. It has been our consistent policy to grant renewal of license to a trustee in bankruptcy only in conjunction with the approval of an assignment to an acceptable assignee. We shall therefore defer action on the renewal application for a period of 60 days so that consideration may be given to the qualifications of the proposed assignee. If it then appears that favorable action is warranted on the assignment application, we shall renew the station license.

10. We do not believe that the action taken here is inconsistent with that taken in *Television Co. of America, Inc.*, 1 F.C.C. 2d 91, 5 Pike &

⁴ Reznick also stated that he had replaced Silberman in August 1963.

⁵ At this time, Dail acquired 4,000 shares of Twelve Seventy stock. In an ownership report filed on Aug. 8, 1963, the Commission was informed of the stock transfer and of the fact that Dail had been made president of the corporation. In October 1963 Dail acquired an additional 5,000 shares of stock from Reznick and this transfer was likewise reported to the Commission.

Fischer R.R. 2d 811, released July 29, 1965, where we denied the request for renewal by a receiver in bankruptcy. In that case, misrepresentations and concealments had been made by the principals of the licensee in connection with the very applications which were then pending before the Commission (1 F.C.C. 2d at 151 (par. 60)). Although the receiver was innocent of any wrongdoing, much of the misconduct occurred after the appointment of the receiver and resulted from the continued association of some of the wrongdoers with the affairs of the station. Moreover, the receiver proposed a transfer back to the corporate licensee which was still controlled by those individuals who had committed numerous acts of misconduct in their improper dealings with the Commission. The ultimate transferee to whom the licensee proposed to assign the license may have been innocent of any misconduct, but manifestly there did not exist the complete disassociation of the guilty parties from the operation and control of KSHO-TV which has been effected by the trustee with respect to Twelve Seventy.

Accordingly, *It is ordered*, This 16th day of March 1966, that the appeal from adverse ruling of the hearing examiner filed October 13, 1965, by David N. Montague, trustee, Twelve Seventy, Inc., *Is granted*;

It is further ordered, That the application for consent to involuntary assignment of station license and construction permit of station WTID, Newport News, Va., tendered for filing December 7, 1964, by David N. Montague, trustee of Twelve Seventy, Inc., *Is accepted* for filing, and the said application *Is granted*;

It is further ordered, That the application for consent to voluntary assignment of station license and construction permit of station WTID to Big T Corp., tendered for filing September 23, 1965, *Is accepted* for filing;

It is further ordered, That the pending application for renewal of station license of station WTID *Is deferred* for a period of 60 days from the release of this memorandum opinion and order;

It is further ordered, That the exceptions to the initial decision of the hearing examiner, filed October 29, 1965, by the trustee, *Are dismissed as moot*; and

It is further ordered, That the petition of the Broadcast Bureau to accept a late filed pleading *Is granted*, and the reply to exceptions submitted November 30, 1965, *Is received*.

2 F.C.C. 2d