

An Open Letter to the Pacifica Community

Since word has leaked out of some shall-we-say disagreements about the national board's course of action, I'm going to take a moment to go over some of this. There is some obfuscation going on, in traditional Pacifica style, and at this point in time, the less of that the better. There are also some assertions being made that, at a minimum, need some back-up before being taken at face value. For ease of reading, I'm going to divide this into three broad sections, although some of the discussion will cross categories because the issues are inter-related. In broad strokes, the topics are a) Bankruptcy i.e. Chapter 11 Reorganization b) Summary Judgment and c) Swap/Sale of License

A) Bankruptcy/Chapter 11 Reorganization

After conversations with several bankruptcy attorneys, Pacifica has determined that a Chapter 11 proceeding will cost between \$500,000 and \$1,000,000. Because Pacifica has assets in excess of its debts, a bankruptcy proceeding would not result in the reduction of debt. It would simply extenuate the process of liquidating assets to pay debts and provide oversight on that process by a bankruptcy judge and a creditors committee.

What bankruptcy does in practical terms is:

1. Add another \$500K to \$1M in Pacifica's lawyers fees
2. Forestall immediate collection activity at enormous cost, essentially increasing the debt load for no value as asset liquidation to pay debts happens regardless
3. Places Empire State Building in the position to collect an even larger amount of **their** attorney's fees and interest for the duration of the delay in payment of the summary judgment and their participation in a creditors committee
4. Lowers the autonomy of the Pacifica Foundation in deciding which assets to maintain and which not to maintain
5. Prevents taking on loans against real estate interests
6. Discourages philanthropic support if any can be found as well as listener support donations because bankruptcy sounds terrible
7. A declaration of bankruptcy greatly complicates a potential signal swap (not a signal sale) on two grounds, firstly the uncertainty that bankruptcy presents to a potential partner in a swap and secondly at the FCC where it is necessary to demonstrate adequate liquid financial resources to operate the new station (usually 3 months of operating expenses in escrow). A petition to deny based on precarious finances could well delay a swap for a considerable period of time, if not indefinitely and one should not expect favors from a Trump FCC for a left-wing radio network. They do favors for Sinclair, not you.

In other words, the normal upside of bankruptcy, which is the discharge for debts which there is no way to pay, doesn't exist in this case, since assets exceed liabilities debt reduction will not occur, so there is no tangible benefit to bankruptcy. It's throwing a million more dollars down the toilet for no reason. Only the lawyers benefit from it.

B) Summary Judgment

On October 3, Pacifica received a summary judgment for \$1.8 million dollars plus attorney's fees. A summary judgment doesn't mean that you **lost** the case. It means that you were determined to have no viable defense to litigate.

A summary judgment is subject to collection activity rapidly. It does take a certain amount of paperwork, but nothing that attorneys of the caliber of ESRT cannot handle rapidly. After the standard 30 days, it's open season on all of your bank accounts and all of your buildings. That date is November 4, 2017, or about two weeks from now.

Therefore, not to put too fine a point on it, it is the responsibility of the governing board and the executives to do whatever they have to do to make the payment on time. The time to negotiate was before summary judgment, not after it. Pacifica tried to settle, with a very low ball offer of \$500K and got absolutely nowhere. You have less negotiating leverage after a summary judgment than you do before it, and you had relatively little then. So the fantasies that Empire will forbear or delay or hold off based on promises are just that – and they are more of what has gone on for the past few years when Pacifica somehow convinced itself it could unilaterally reduce the rent without a written agreement. Which is what you did for two years. If you repeat it post-summary judgment, that would be a very serious mistake. If you have a loan on the table that will pay the summary judgment by November 4, you do that transaction and you do it now and what you “debate” about is what you will do to pay the loan back.

There is no other creditor and no other obligation that is a higher financial priority and no other debt is of this immediate consequence. Acting as if Empire is just one creditor among many and you can decide when to pay them is quite wrong. That period of time is over. You will pay them, in the full amount of the judgment, by November 4, or they will pay themselves and you will lose the ability to operate your stations, which is your mission and your purpose. And every day that you delay taking a loan is increased attorney fees and interest due to ESRT, so you are throwing bad money after bad money. The last thing in the world that you want to do is pay another million dollars to ESRT's attorneys because you couldn't face up to paying the debt promptly. As a donor, I resent you spending my money that way and I won't be the only one. The debt has to be paid right now. This month. Now. Take the best real estate loan you can get and pay it before you have no more choices.

I have heard something to the effect that you believe you have \$5-\$6 million in pressing debts payable in the next six months. You would do well to document that figure as well as avoid unclear adjectives like “pressing”. A summary judgment is not a pressing debt. It is a paramount obligation and nothing is more pressing in any way, shape or form. You can evaluate the other priorities by urgency, but you should not muddle the situation by sweeping up a summary judgment into “debts”. It is the other financial obligations in which terms like forbearance and negotiate might play a role, not in the summary judgment already executed against you.

C) Swap or License Sale

To start at the beginning, the mission statement of the organization is to operate radio stations. A mission statement is not a cute soundbite for your website, it is your reason to exist and it is why you get a tax exemption from the government. Pacifica is not a real estate trust. There may have been the purchase of real estate to facilitate the mission, but the mission is not to acquire and retain buildings and land. You do not get to change the mission statement. You are in your positions to execute it. So you do what is necessary to continue broadcasting, not what is necessary to retain real estate holdings. That has to be the basis for any discussion.

Of your five licenses, two are commercially-convertible and three are not, which makes a significant difference in their value. Four are in the top five media markets and one is in the top 10 media market and all have pretty significant range, with KPFK the largest NCE license in the Western half of the United States.

Both a sale and a swap are contingent on several things, among them a membership vote and FCC approval. A sale, potentially to another non-commercial broadcaster, would subject the buyer to FCC scrutiny, but not the seller. A swap subjects both parties to FCC scrutiny and is generally a more complicated transaction and will yield less cash, but may preserve a Pacifica station in the affected signal area. An FM-FM swap would retain a Pacifica station as we recognize them. An FM-AM swap would necessitate a complete program overhaul in the affected signal area as music broadcasting is impossible on AM, so you would be left with a talk-only format.

You can expect that petitions to deny will be filed against a sale or swap transaction, in addition to a national election referendum, so your timeline is at least a year out. I don't disagree that in the long-term it may be very difficult to find any financial stability without some sort of license transaction. However long-term and short-term are two very different things. The realistic scenario for a sale or swap means a few things need to be dismissed out of hand:

- 1) A sale or swap is of no value in addressing the summary judgment or **any** short-term pressing debts. It's not a plan for that. Besides the concrete factor that you need a buyer and a specific written offer, Pacifica's board and executives have no ability to execute a swap or sale or agree to one without the completion of a national referendum. Therefore you cannot collect any money from a buyer that is not 100% returnable pending a referendum failure and it cannot be used to pay any of your pressing debts, unless you want to compound your problems. And I doubt any media property buyer is that stupid anyway.
- 2) I've heard some avenue of thinking that you might try to get Empire to forbear collection based on a security interest in the proceedings of a license swap citing the *Tracy Broadcasting* case. That case is a serious outlier, the law is extremely unsettled in this regard, and that is all exhaustively discussed in the Broadcast Law Blog here: <http://www.broadcastlawblog.com/2011/09/articles/securing-a-loan-to-a-broadcaster-part-2-bankruptcy-cases-and-liens-on-licenses/> Among other factors is that the cases in question involve commercial entities, not NCE licenses and 501(c)-3 organizations, and that a security interest in a transaction that requires membership approval, requires FCC approval, and is held by a creditor who cannot force the entity into bankruptcy, is basically worthless to the creditor. In other words, it provides nothing additional to the summary judgment already secured by ESRT. ESRT is not qualified to own an NCE license.

So while a license sale or swap in the long-term may be necessary to get out of a debt position long-term, and I say that with great sadness, it is of no value for the immediate issues at hand, which are satisfying the summary judgment amount in two weeks and paying whatever amount of immediate pressing debts that you cannot get out of in the next few months. For that, you have only your real estate assets, and it is a fortunate thing that you have them.

It may be somewhat distasteful and that is why there is fighting, but you must leverage them to get you through the next year, at which point you may be able to execute on a sale or swap of a license. An immediate real estate loan to settle the summary judgment and then the judicious liquidation of one or more real estate properties to allow you sufficient cash to make payments on the loan for a year and set up payment plans on the remaining debts for the next 6-9 months. That may include dispensing with the superfluous Berkeley restaurant property, and/or it may include a lease back sale on one of your other properties that would include sufficient time to secure another facility and move on a reasonable time schedule.

I realize there is a Ten Little Indians dynamic in trying to decide which real estate properties to utilize and which signals to entertain license sale or swaps for, and it is an ugly thing to watch and probably an even uglier thing to participate in, but it is your responsibility now to use these public assets, which is what they are, to fulfill your mission statement. That is why you were given the money to acquire them and they are to be used for the purpose of continuing broadcasting operations.