Federal Communications Commission
Washington, D.C. 20554

DA 04-570
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Re: Applications for Assignment of License/Transfer of Control of
Television Stations
WTTE(TV), Columbus, Ohio
WNUV(TV), Baltimore, Maryland
WRGT(TV), Dayton, Ohio
WTAT(TV), Charleston, South Carolina
WVAH(TV), Charleston, West Virginia
File Nos. BALCT-20031107AAF, ABB and ABM
and BTCCT-20031107AAF and AAP
FAC. ID: 411, 416, 417, 7933 & 74137

Dear Counsel:

This concerns the applications for assignment of license and transfer of control of the above-referenced television stations from the licensee subsidiaries of Cunningham Broadcasting Corporation (Cunningham) to the licensee subsidiaries of Sinclair Broadcast Group, Inc. (Sinclair). On December 19, 2003, Rainbow/PUSH Coalition (Rainbow) filed a petition to deny the applications.[1] For the reasons set forth below, we dismiss as defective the applications in accordance with Section 73.3566 of the Communications Rules and deny the petition to deny filed by Rainbow.

This is the third time these parties have been before the Commission seeking approval of transactions involving the sale of television stations. In 1998, Sinclair and Cunningham (then Glencairn, Ltd.) sought to acquire certain television stations from Sullivan Broadcasting Company. Rainbow opposed the applications arguing that the transactions in that proceeding resulted in Sinclair exercising *de facto* control over Glencairn in violation of Section 310(d) of the Communications Act. In *Glencairn, Ltd.,* the Commission granted in part and denied in part

[1] Also before us are oppositions filed by Cunningham and Sinclair on January 16, 2004, and Rainbow's reply filed January 29, 2004.

Rainbow's petition to deny.[2] The Commission found that a unique combination of facts demonstrated that Sinclair had exercised *de facto* control over Glencairn. The Commission concluded that, despite the improper actions of Sinclair and Glencairn, designation for hearing of the applications was not warranted. Sinclair and Glencairn were each issued forfeitures and the applications were granted. Rainbow appealed the decision to the U.S. Court of Appeals for the District of Columbia Circuit. The court denied Rainbow's appeal finding that it had failed to demonstrate that it suffered the injury-in-fact required for standing to challenge the Commission's decision.[3]

In 2002, Cunningham proposed to assign the above-referenced stations to Sinclair. Rainbow again opposed the applications. Sinclair argued that, despite the fact that its ownership of the five stations would not comply with the Commission's 1999 television duopoly rule, the Commission should consider its applications to acquire Cunningham's stations. Sinclair pointed to the fact that the U.S. Court of Appeals for the District of Columbia Circuit had ruled on the Commission's adoption of the 1999 television duopoly rule. The staff, however, found that Sinclair had mischaracterized the court's decision. The staff found that the court had not vacated the 1999 television duopoly rule, but rather remanded it to the Commission solely to determine which media should be included in the definition of "voices."[4] The staff concluded, therefore, that the 1999 television duopoly rule continued in effect in the interim. Because Sinclair's ownership of Cunningham's stations would not comply with the television duopoly rule, the staff dismissed the applications as defective under Section 73.3566 of the Rules.

With respect to Rainbow's petition to deny, the staff, citing the dismissal of the underlying applications and Rainbow's court challenge (that was pending at the time), dismissed the petition as moot. Rainbow filed an Application for Review of the dismissal of its petition to deny arguing that the staff should have considered the allegations it raised.

In the present applications, Sinclair once again acknowledges that its ownership of the Cunningham stations would not comply with the 1999 television duopoly rule. Since the 2002 staff decision, the Commission has adopted new media ownership rules.[5] Under the new rules, Sinclair would be permitted to own the five Cunningham stations. Implementation of the new media ownership rules, however, was stayed by the U.S. Court of Appeals for the Third Circuit.[6] In that decision, the Court ordered that "the prior ownership rules remain in effect pending resolution of these proceedings." The 1999 television duopoly rule, therefore, is again in effect.

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[2] 16 FCC Rcd 22236 (2001)(*Glencairn, Ltd.*).

[3] *See Rainbow/PUSH Coalition v. FCC*, 330 F. 3d 539 (D.C. Cir. 2003)(*Rainbow/PUSH*).

[4] *See Sinclair Broadcast Group, Inc. v. FCC*, 284 F. 3d 148 (D.C. Cir. 2002) .

[5] See Review of the Commission's Broadcast Ownership Rules*, Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620 (2003).

[6] *See Prometheus Radio Project v. FCC*, No. 03-3388 (3rd Cir. 2003).

We once again conclude that Sinclair's ownership of the Cunningham stations would not comply with the 1999 television duopoly rule. The Court made it clear that the 1999 television duopoly rule would remain in effect pending review of the Commission's new media ownership rules. Sinclair has once again prematurely sought to acquire stations that it may not own under the rules currently in place. Sinclair again requests that we overlook this deficiency and allow it to own the five Cunningham stations. We deny Sinclair's request. It would be premature to allow Sinclair's ownership during the pending court challenge. Sinclair also asks that we waive the 1999 television duopoly rule to permit its ownership of the Cunningham stations. We find that Sinclair's request for waiver is really more an argument to change the 1999 television duopoly rule. That matter is part of the pending court challenge.

In its petition to deny, Rainbow asks that we again consider its allegations. It asks that we consolidate the allegations it raised in its 2002 pleadings with consideration of its instant petition. While our dismissal of the instant Sinclair applications would ordinarily render moot Rainbow's petition, in an effort to resolve these matters and for administrative efficiency, we will consider, on their merits, all of the allegations raised by Rainbow.

Rainbow claims standing to file its petition to deny. Rainbow included declarations under penalty of perjury of authorized members of its organization that are residents and viewers within each station's community of license.[7] Each person outlined purported harm that they would experience if the applications were granted. Cunningham and Sinclair argue that Rainbow has not sufficiently demonstrated its standing. They cite to the fact that Rainbow was unable to demonstrate standing in *Rainbow/PUSH*.[8] We find that Rainbow has demonstrated the requisite standing in this case. We have long recognized standing through a viewer's residency in a station's community of license.[9] As the court stated in *Rainbow/PUSH*, the standard for administrative standing may permissibly be less demanding than the criteria for judicial standing under Article III of the Constitution.[10] The fact that Rainbow was unable to demonstrate standing in its recent court appeal, therefore, does not preclude a finding of standing in this case.

Rainbow reprises arguments that it raised in *Glencairn, Ltd.* Rainbow argues that Sinclair and Cunningham are engaged in the same types of prohibited activities that resulted in forfeitures in that proceeding. Rainbow cites to what it calls "ridiculously low" sales prices for the Cunningham stations. Rainbow points out that this was a factor in *Glencairn, Ltd.*[11] The sales prices of the Glencairn stations in that case was only one of a number of factors that the Commission cited to support its conclusion that Sinclair had exercised *de facto* control over

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[7] *See United Church of Christ v. FCC*, 359 F. 2d 994 (D.C. Cir. 1966)(*UCC*).

[8] *See Rainbow/PUSH*, *supra*.

[9] *See UCC*, *supra.*

[10] *Rainbow/PUSH* at 542.

[11] *See Glencairn, Ltd.*, 16 FCC Rcd at 22250.

Glencairn. As the Commission noted in *Glencairn, Ltd.*, we traditionally do not examine the purchase price in a station sale unless it appears from other facts that the arrangement may not have been an arm's-length transaction between the parties. Unlike in *Glencairn, Ltd.*, we find no other facts to question the *bona fides* of this transaction.

Rainbow cites to certain provisions in the sales agreement between Sinclair and Cunningham that it claims are indicative of Sinclair's *de facto* control. Rainbow cites to a provision that limits Cunningham's ability to enter into new contracts in excess of certain amounts (originally $10,000 and then amended to $25,000) that will be binding upon on Sinclair. Sinclair maintains that this is a standard provision in sales agreements involving broadcast properties. The purpose of the provision is to ensure that the seller does not enter into large contracts thus obligating the buyer to additional liabilities while the transaction is pending. As Sinclair points out, the provision does not prohibit Cunningham from entering into agreements in excess of the limit. It only provides that Sinclair is not required to assume such contracts at closing. We conclude that such a standard contract clause in no way indicates Sinclair's control over Cunningham or that the sales agreement was not an arm's-length transaction.

Rainbow also challenges the Local Marketing Agreements (LMAs) between Sinclair and Cunningham. The LMAs have been in place for five years and were favorably reviewed by the Commission in *Glencairn, Ltd*. The Commission requested certain changes to the LMAs, but otherwise found that the LMAs complied with the Commission's Rules and policies. Rainbow raises nothing new to convince us that the LMAs should be reexamined.

Finally, Rainbow points to content on the web pages of certain Cunningham stations as indicative of Sinclair's control of these stations. The Commission has previously held that the content of station websites is wholly irrelevant to the determination of station control.[12] None of the content cited to by Rainbow is evidence that Sinclair controls these stations. Because Sinclair is currently programming the stations pursuant to LMAs, it would not be unusual to see references to Sinclair on the stations' web site. At the same time, Cunningham is accurately listed as the stations' licensee.

We conclude that Rainbow has failed to raise a substantial and material question of fact that would warrant further consideration in this case. We therefore deny Rainbow's 2002 and 2003 petitions.

According, in view of the foregoing, the petitions to deny of the Rainbow/PUSH Coalition ARE DENIED and its application for review IS DISMISSED as moot.

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[12] *See Secret Communications II, LLC*, 18 FCC Rcd 9139 (2003).

In addition, the applications for assignment of license/transfer of control of WTTE(TV), Columbus, Ohio; WNUV(TV), Baltimore, Maryland; WRGT(TV), Dayton, Ohio; WTAT(TV), Charleston, South Carolina; and WVAH(TV), Charleston, West Virginia, ARE DISMISSED.[13]

Sincerely,

W. Kenneth Ferree
Chief, Media Bureau

cc: David Honig, Esq. – Counsel for Rainbow/PUSH Coalition

[13] Sinclair also has a pending application to acquire WBSC-TV, Anderson, South Carolina (File No. BTCCT-19991116BDP). The Commission dismissed the application as defective for failure to comply with the television duopoly rule, but Sinclair filed a petition for reconsideration. *See Edwin L. Edwards, Sr.*, 16 FCC Rcd 22236 (2001). We defer consideration of Sinclair's proposed acquisition of WBSC-TV to the Anderson, South Carolina, proceeding.