



Federal Communications Commission  
Washington, D.C. 20554

DA 05-1485  
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Re: KOWH(TV), Lincoln, Nebraska; ID  
No. 84453; File No. BTCCT-  
20040330BDM; Application for  
Transfer of Control

Dear Counsel:

This letter is in regard to the application of Lincoln Broadcasting, LLC (Lincoln), permittee of station KOWH(TV) (Station), Lincoln, Nebraska, to transfer control of Lincoln from World Investments, Inc. (World) to CFM Communications, LLC (CFM). An informal objection was filed by Gray Television Licensee, Inc. (Gray), licensee of station KOLN(TV), Lincoln, Nebraska. CFM filed an opposition to the informal objection to which Gray replied.<sup>1</sup> Gray's objections are based on alleged improprieties in the relationship between CFM and Pappas Telecasting Companies, licensee of station KHGI-TV, Kearney, Nebraska and its satellite KWNB-TV, Hayes Center, Nebraska. For the reasons stated below we deny the informal objection and grant the application.

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<sup>1</sup> CFM later filed a supplement to its opposition, which Gray opposed. CFM filed a reply to Gray's opposition.

Attached to the application are an Interest Purchase Agreement between Lincoln, CFM and World; an Assignment Agreement between CFM and Pappas, which assigns Pappas's option to purchase Lincoln to CFM; and an Option Agreement between CFM and Pappas.

Under the Interest Purchase Agreement, CFM shall purchase the Station for \$300,000, plus any reasonable expenses incurred by World in connection with the Station.

The Assignment Agreement states that Pappas will guarantee CFM's loans to finance the purchase of the Station. In addition, the Assignment Agreement states that, upon closing, CFM and Pappas will enter into a Time Brokerage Agreement (TBA), a Joint Sales Agreement (SSA) and a Station Construction Agreement (SCA). Those agreements are not included with the application; however, the key terms of those agreements are included in the Assignment Agreement.

Under the terms of the TBA, Pappas will provide sales, promotion, engineering, production, traffic and general administrative services to CFM. Pappas will also program up to 15% of KOWH(TV)'s weekly broadcast schedule. CFM agrees to fill the remaining 85% of the station's weekly hours of operation with "paid" or "bartered" programming in which the programmer either pays the station to broadcast the programming or makes the programming available to the station without charge. If there is any commercial advertising time available within or adjacent to this programming, that time will be subject to the terms of the JSA. CFM is to consult with Pappas on the selection of the block programming for the time that CFM will program the station, but ultimate control is to remain with CFM. CFM shall reimburse Pappas for its expenses incurred in providing engineering and other support services related to the time period that CFM is programming the station, provided that the payments do not exceed the revenue associated with that period of time.

At the time the parties enter into the TBA, Pappas will make an initial, non-refundable payment to CFM of between \$25,000 and \$40,000 depending on the date of the closing on the sale of the station. Pappas shall then pay \$100,000 per year in consideration for CFM making 15% of the broadcast time per week available to Pappas. Pappas also will reimburse CFM for all reasonable station expenses. In addition, Pappas shall pay CFM 80% of all revenues, net expenses, from the sale of advertising time during the time the station is programmed by CFM. These amounts do not offset the other payments that Pappas is to make to CFM under the TBA.

The TBA will have an eight year term, renewable for an additional eight years and will be assignable, subject to the consent of CFM. CFM may assign its obligations under the TBA subject to the consent of Pappas.

Under the terms of the SCA, Pappas shall construct the station at its sole cost, but under the supervision and control of CFM. CFM shall then lease the facilities from Pappas at fair market value.

In the Option Agreement between CFM and Pappas, the parties agree that CFM will assume Pappas' existing option to purchase KOWH(TV) and will in turn grant a new option to Pappas. Under the terms of the Option Agreement, Pappas or its assignee may purchase the Station within two years after closing by CFM for the price paid by CFM, plus any amounts reasonably expended by CFM in connection with the acquisition and a lump sum of \$55,000. If Pappas exercises its option more than two years after the closing by CFM, those amounts shall be adjusted using the Consumer Price Index, provided that the percentage is not a negative number. The Option Agreement may be extended for one eight year term at the election of Pappas. In consideration, Pappas has paid to CFM a lump sum of \$50,000. Pappas further commits to pay CFM \$20,000 per quarter until the earlier of March 1, 2005, the date of closing by CFM on the assignment from World, or the date that CFM's option has been terminated by World. In addition, the Option Agreement obligates Pappas to pay CFM \$5,000 per month, commencing October 1, 2004 and ending either March 1, 2005 or upon closing by CFM. The Option Agreement provides that, in no event will the price paid for the option exceed 33% of the price paid by CFM for the Station. The option price is not to be counted against the price to be paid upon exercise of the option. If CFM's rights under its option agreement to buy the station have been terminated by World, Pappas is obligated to pay CFM a lump sum of \$40,000.

In its Informal Objection, Gray asserts that the application is "illusory" to the extent that it purports to insulate Pappas from control over KOWH(TV). First, Gray objects that Pappas assigned its option to CFM and then CFM granted a new option to Pappas, which Gray claims defeats the purpose of the application, which is to place CFM in control of the Station. Next, Gray seems to imply that the Option Agreement gives Pappas an attributable interest in the station under the Commission's Equity-Debt-Plus (EDP) policy.<sup>2</sup>

Gray claims that even though Pappas might not hold an attributable interest in the station, it would have *de facto* control over it and its operation. In support of its position, Gray asserts that the TBA would give Pappas complete control over Station operations. Gray argues that, although the TBA only grants Pappas the right to provide up to 15% of the Station's programming, the remaining 85% of the programming must consist of paid or bartered programming which Pappas must approve, effectively prohibiting the licensee from providing any programming on its own. Next, Gray argues that Pappas is to provide financial guarantees to enable CFM to purchase the Station, but that the money will be repaid rapidly through payments made under the TBA. Furthermore, Pappas is to pay directly for all engineering, production and other Station expenses incurred under the TBA. Also, under the JSA Pappas picks up the cost of all sales during the time CFM is programming the Station. The agreements also obligate Pappas to build the Station and lease it to CFM. Gray also objects because Pappas is entitled to specific performance of the terms of the Assignment Agreement and because all of the agreements can be extended for an additional 8 years at the option of Pappas.<sup>3</sup>

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<sup>2</sup> See 47 C.F.R. § 73.3555, Note 2(i)(2004).

<sup>3</sup> Gray argues that CFM has failed to disclose the percentage of its total assets owned by Carol Miller. The application lists Ms. Miller as the sole member of CFM, which is an LLC. As CFM points out in its pleadings, if Ms. Miller is the sole member of an LLC, she owns all the assets.

In its Further Supplement to Informal Objection,<sup>4</sup> Gray represents that Pappas is in control of two other stations in the Lincoln-Hastings-Kearney DMA, KTVG(TV), Grand Island Nebraska, licensed to Hill Broadcasting Company, Inc., and KSNB-TV, Channel 4, Superior Nebraska, licensed to Colins Broadcasting Company. KSNB-TV rebroadcasts the programming of KTVG(TV) and Pappas has time brokerage agreements with both stations. Neither of these stations or licensees are at issue in this proceeding and none of them have are alleged to have a relationship with Ms. Miller, CFM or the Station. Therefore, Gray's allegations regarding these other licensees are irrelevant to this proceeding and will not be considered here.<sup>5</sup> Gray also notes that Pappas is the licensee of KPTM(TV), Omaha. KPTM(TV) is in the Omaha DMA, which is separate from the Lincoln-Hastings-Kearney DMA and its ownership is, therefore, not relevant to this proceeding.

In its Opposition, CFM states that the option held by Pappas is not attributable until exercised.<sup>6</sup> CFM then states that the Assignment Agreement and the CFM Option were specifically tailored to comply with the EDP policy. As noted above, both agreements contain provisions stating that any amounts paid to CFM would not exceed the EDP limits. In regard to Gray's assertions regarding Pappas' alleged control of programming at the Station, CFM points out that the Assignment Agreement states that CFM shall select programming in consultation with Pappas, but that programming decisions shall be under the ultimate control of CFM. CFM also argues that the TBA limits Pappas to programming less than 15% of the broadcast time of the Station and is not, therefore, attributable.<sup>7</sup>

In its Reply, Gray argues that, although none of the individual relationships between CFM and Pappas might create an attributable relationship, the totality of the relationships does create attribution. Gray also argues that CFM is under the financial control of Pappas, claiming that CFM will have to pay nearly all the funds which it might receive to Pappas to repay Pappas for advancing CFM for the cost of acquiring its interest in Lincoln. Gray's arguments on this point are based on two apparent misconceptions. First, Pappas is guaranteeing the loans taken out by CFM to purchase the Station. Nothing in the record indicates that Pappas is advancing any money to CFM for the purchase of the station. Merely guaranteeing a loan does not create an

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<sup>4</sup> In its first Supplement to Informal Objection, Gray stated that the informal objector had originally been misidentified as KOLN/KGIN Licensee, Inc., when it should have been Gray.

<sup>5</sup> In its pleadings, Gray also alleges that Pappas financially controls one of the applicants for digital Channel 53, Lincoln, Nebraska (File No. BPCT 19951106KP), but does not give any evidence to support its allegations. The applicant at issue is Larry Miller, Carol Miller's husband. Gray argues that Carol Miller failed to properly disclose her relationship with Larry Miller. Larry Miller's application was dismissed May 3, 2002 and has not been reinstated. Therefore, there is no basis to consider Gray's arguments regarding Channel 53 in this proceeding.

<sup>6</sup> Citing 47 C.F.R. § 73.3555, Note 2(e).

<sup>7</sup> Citing 47 C.F.R. § 73.3555, Note 2(j)(2). CFM also points out that television JSAs are not attributable under the Commission's current rules.

attributable interest.<sup>8</sup> Second, the \$100,000 annual payment on which Gray seems to base its allegation regarding repayment of funds is being made by Pappas to CFM for making time available to Pappas on the Station, not the other way around.

In its Supplement to its Opposition, CFM argues that our recent decision in *Malara Broadcast Group (Malara)*<sup>9</sup> is controlling in this case, while Gray states in its Opposition to the Supplement that the case is not controlling and repeats its earlier arguments. Both parties' arguments are discussed in detail below.

Gray has failed to establish any impermissible relationship between CFM and Pappas. The fact that Pappas assigned its original option to CFM and then CFM granted a new option to Pappas is irrelevant. Our Rules clearly state that Options are not attributable until exercised.<sup>10</sup> The consideration paid for an option may be relevant under our EDP analysis, but the agreements here specifically limit the amounts to be paid so that they will comply with the EDP limits and Gray has not presented any evidence that the payments will not comply. As discussed above, loan guarantees are not attributable. As CFM correctly notes, TBAs for less than 15% per week of a station's broadcast time are not attributable and neither are JSAs nor shared services agreements.<sup>11</sup> Arrangements very similar to the ones at issue here were recently approved in *Malara*. We will, however, require three changes to the agreements in this proceeding.

We will require the parties to modify the requirement in Paragraph 5(e), of the Assignment Agreement that requires CFM to fill the 85% of its broadcast time that it programs with paid or bartered programming. Although CFM may fill its broadcast day with such programming at its own discretion, requiring it to do so is an impermissible intrusion on its right to control the programming on its Station. In Paragraph 5(e)(i), we will require the parties to delete the requirement that CFM consult with Pappas on the selection of programming during the time that CFM is programming the station. Both of those requirements represent an impermissible level of interference in the licensee's control of the programming of its station. We will also require that the SCA and any other agreements dealing with the lease of facilities provide that Pappas must give CFM a minimum of twelve months notice before terminating or failing to renew any lease or other agreement for CFM's use of broadcast or broadcast-related facilities, of any type, that are provided by Pappas or any of its affiliates to CFM. Lack of such a condition would leave CFM's ability to broadcast at the mercy of Pappas and deprive CFM of its independence as a licensee.

In assessing the merits of a petition to deny or an informal objection, we follow a two-step analysis. First, we determine whether the petition makes specific allegations of fact which, if

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<sup>8</sup> *Malara Broadcast Group*, 19 FCC Rcd 24070 (VSD 2004).

<sup>9</sup> *Id.*

<sup>10</sup> 47 C.F.R. §73.3555, Note 2(e).

<sup>11</sup> 47 C.F.R. §73.3555, Note 2(j) and (k).

true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. If so, we then proceed to examine and weigh all of the material before us, including the applicant's submissions, to determine whether there is a substantial and material question of fact requiring resolution in a hearing.<sup>12</sup> If the facts are not disputed, but disposition turns on inferences and legal conclusions to be drawn from facts already known, a hearing is unnecessary.<sup>13</sup>

Gray has failed to raise a substantial and material question of fact that grant of the subject application would be inconsistent with the public interest. Therefore, Gray's Informal Objection is DENIED. Having found the applicants fully qualified, we conclude that grant of the subject application would serve the public interest.

ACCORDINGLY, the application to transfer control of Lincoln Broadcasting, LLC, permittee of station KOWH(TV), Lincoln, Nebraska, from World Investments, Inc. to CFM Communications, LLC (File No. BTCCT-20040330BDM) is GRANTED, subject to the modifications of the agreements between the CFM and Pappas Telecasting Companies and its affiliates as discussed above. These modifications must be made prior to closing on the transfer of control and are to be reflected in all final agreements between the parties. Copies of the agreements as modified shall be served on Barbara A. Kreisman, Chief, Video Division, Media Bureau, with a copy to David N. Roberts, Attorney Advisor, Video Division, Media Bureau within 20 days of the date of this letter.

Sincerely,

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau

cc: Colins Broadcasting Company  
c/o Michael D. Basile, Esq.  
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<sup>12</sup> See 47 U.S.C. §§ 309(d)(1) and (2), as explained in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1998).

<sup>13</sup> *Stone v. FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972).