



Federal Communications Commission
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In Reply Refer To:

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David A. Schum
DFW Radio License, LLC
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Re: KFCD(AM), Farmersville, TX
Facility ID No. 43757
File No. BAL-20060117ACU

KHSE(AM), Wylie, TX
Facility ID No. 133464
File No. BAP-20060117ACV

Application for Assignment of Licenses

Dear Applicants:

We have before us the above-captioned application (the "Assignment Application") proposing to assign the license of Station KFCD(AM), Farmersville, Texas, and the construction permit of Station KHSE(AM), Wylie, Texas, from DFW Radio License, LLC ("DFW Radio") to Bernard Dallas LLC ("Bernard"). We also have before us a Petition to Deny ("Petition"), filed February 23, 2006, by nine investors in Stations KFCD(AM) and KHSE(AM) (the "Petitioners").¹ For the reasons stated below, we deny the Petition and grant the Assignment Application.

Background

On February 5, 2004, The Watch, Ltd. ("Watch"), the former licensee of KFCD(AM) and permittee of KHSD(AM), and D.B. Zwirn Special Opportunities Fund, L.P. ("DBZ") entered into a Financing Agreement (the "Agreement") whereby DBZ provided a loan to Watch to facilitate Watch's

¹ Petitioners are David A. Schum, J. Michael Lloyd, Frank D. Timmons, Carol D. Kratville, Brian M. Brown, Robert E. Howard, Edwin E. Wodka, John W. Saunders, and Richard J. Drendel. Bernard filed an Opposition to the Petition on March 8, 2006, to which the Petitioners filed a Reply on March 16, 2006.

emergence from Chapter 11 bankruptcy,² operation of KFCD(AM), and construction of KHSE(AM). The Agreement also provided for the assignment of the KFCD(AM) license and KHSE(AM) permit to DFW Radio, a wholly-owned subsidiary of Watch.³

In the spring of 2005, DBZ notified Watch and DFW Radio (Watch and DFW Radio, collectively, the “Debtors”) that they were in default under the Agreement and demanded full payment of all obligations.⁴ Subsequently, on May 25, 2005, DBZ filed for the appointment of a receiver in the U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Court”).⁵ The Debtors simultaneously filed for relief and reorganization under Chapter 11 of the Bankruptcy Code.⁶ On May 27, 2005, DBZ filed a motion to appoint a Chapter 11 trustee for the bankrupt companies or, in the alternative, to convert the case to a Chapter 7 liquidation (“Chapter 11 Motion”).

The Debtors and DBZ subsequently agreed to resolve the Chapter 11 Motion on the following terms and conditions, memorialized by a June 23, 2005, Order of the Court:⁷ (1) the Debtors were authorized to obtain additional financing from DBZ to construct KHSE(AM);⁸ (2) the loan proceeds were to be “advanced to or as directed by W. Lawrence Patrick [“Patrick”], the Debtors’ proposed Media Broker”;⁹ (3) Patrick was authorized to supervise construction, employ a superintendent of construction, and market KFCD(AM) and KHSE(AM) for sale;¹⁰ and (4) prior to September 20, 2005, David A. Schum (“Schum”), the sole manager of DFW Radio and one of the Petitioners, was allowed to seek third-party refinancing and thus halt the sales process.¹¹

Schum was unable to obtain third-party refinancing, and the Court mandated that the Debtors’ assets be sold at a public auction. At the October 13, 2005, public auction, the Debtors received bids

² See *In re Renaissance Radio, Inc.*, Case No. 03-33479-BJH-11. Renaissance Radio, Inc. (“Renaissance”) is the former owner of KFCD(AM) and KHSE(AM). Pursuant to Renaissance’s Chapter 11 plan of reorganization, the stations were assigned from Renaissance to Watch, a newly-formed and commonly-controlled partnership. See BAL-20031126ATD, ATE (consummated February 5, 2004).

³ On May 17, 2004, the Commission granted an application to assign the station authorizations from Watch to DFW Radio. See BAL-20040305ACG, ACH (consummated June 1, 2004).

⁴ See Petition at 5; Opposition at 3.

⁵ See “Plaintiff’s Original Petition and Application for Appointment of a Receiver,” attached as Exhibit B to Opposition.

⁶ See *In re The Watch, Ltd, et al.*, Case Nos. 05-35892-BJH-11 and 05-35874-BJH-11. On January 5, 2006, the Commission granted an application to assign the license for KFCD(AM) and the construction permit for KHSE(AM) from DFW Radio to DFW Radio License, LLC, Debtor-in-Possession. See BAL/BAP-20050713ABE, ABF. DFW Radio has not yet notified the Commission that the assignment has been consummated.

⁷ See “Agreed Order Regarding Emergency Motion to Appoint Chapter 11 Trustee or, in the Alternative, to Convert Case to Chapter 7,” dated June 23, 2005, Case No. 05-35874-BJH (the “June 23, 2005, Order”), attached as Exhibit A to Opposition.

⁸ *Id.* at ¶ 1.

⁹ *Id.*

¹⁰ *Id.* at ¶¶ 1-2.

¹¹ *Id.* at ¶ 4. See also Court’s July 20, 2005 “Rights Order Pursuant to Stalking Horse Designation Procedure and Other Bid Procedures,” attached as Exhibit E to Opposition.

from six separate bidders. Attorneys for the Debtors designated DBZ as the successful bidder with its highest credit bid, and on December 5, 2005, the Court reviewed the marketing and sales procedures and approved the sale of the Debtors' assets to DBZ.¹² DBZ subsequently assigned its purchase rights to Bernard, its newly-formed affiliate, and on January 17, 2006, the parties filed the subject application seeking Commission consent to assign the license for KFCD(AM) and the permit for KHSE(AM) from DFW Radio to Bernard.

The Petitioners object to the grant of the Assignment Application on four grounds. First, the Petitioners allege that the auction sale to DBZ amounts to "the attempted sanctioning of a reversionary interest"¹³ in violation of Section 73.1150 of the Commission's Rules (the "Rules").¹⁴ Second, the Petitioners contend that DBZ prematurely assumed control of the construction of KHSE(AM) in violation of Section 310(d) of the Communications Act of 1934, as amended (the "Act").¹⁵ Third, the Petitioners assert that DBZ threatened Schum with legal action when Schum attempted to exercise control over the KHSE(AM) construction, and thus abused the Commission's processes. Finally, the Petitioners state that Bernard failed to disclose fully the ownership information of DBZ, its principal equity owner, and that DBZ may not comply with the Commission's foreign ownership limitations.¹⁶

Discussion

Standing. Petitioners are nine equity owners of Watch, the parent company of DFW Radio. Petitioners claim standing to file the Petition based upon their assertions that: (1) the majority of the Petitioners live in the primary service areas of Stations KFCD(AM) and KHSE(AM) and have been, or will be, listeners of the stations; and (2) all of the Petitioners will lose their investments in the stations and suffer "severe economic harm" if the Commission grants the Assignment Application.¹⁷ Bernard counters that the Petitioners lack standing, and the Petition should be denied, because: (1) the Petitioners make no claim regarding programming on KFCD(AM) and "cannot possibly be listeners of KHSE – a just-constructed station that ... is still awaiting a grant of program test authority";¹⁸ and (2) Petitioners have not shown how denying the Assignment Application would prevent the alleged economic harm from occurring.¹⁹

¹² On December 27, 2005, the Court entered its written order approving the sale of the assets to DBZ. *See* December 27, 2005, Court "Order (A) Approving Sale Free and Clear of Certain Liens, Claims, Rights, Interests and Encumbrances to Zwirn Special Opportunities Fund, L.P. or Its Designee and (B) Granting Requested Relief," attached at Exhibit 10 to Assignment Application (the "December 27, 2005, Order").

¹³ Petition at 6.

¹⁴ 47 C.F.R. § 73.1150.

¹⁵ 47 U.S.C. § 310(d).

¹⁶ *See* 47 U.S.C. § 310(a-b).

¹⁷ Petition at 2-3.

¹⁸ Opposition at 5.

¹⁹ *Id.* at 6. According to Bernard, "were the application denied, the Petitioners would not recoup their 'investments'; rather, the companies' assets would remain part of the bankruptcy estate and be used to satisfy the debts owing to creditors." *Id.*

When challenging an application pursuant to Section 309(d)(1) of the Act,²⁰ a petitioner must demonstrate party-in-interest status. The Commission accords party-in-interest status to a petitioner who demonstrates *either* (1) residence in the station's service area, *or* (2) that he/she listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station.²¹ Petitioners have satisfied this standard by submitting declarations, under penalty of perjury, certifying that the majority of Petitioners reside within the stations' primary service areas, and therefore we find that they have sufficiently demonstrated party-in-interest status under Section 309(d). Accordingly, we need not consider Petitioners' further claim of standing based on economic harm.

Reversionary Interest. The Petitioners assert that through the auction sale, "a creditor [DBZ], who had no right to a lien or a hypothecation of a Commission license, got a non-expert judicial officer to obtain for it what the law would not allow – a reversionary interest in the KFCD license and KHSE construction permit."²² The auction sale, Petitioners aver, is inconsistent with the D.C. Circuit's recent decision in *Kidd Communications* ("*Kidd*"),²³ and the Assignment Application must therefore be denied. Bernard counters that the Petitioners' reliance on *Kidd* is misplaced, and the Assignment Application does not implicate the Commission's policy prohibiting a license holder from granting a security interest in a broadcast license and Section 73.1150 of the Rules, which prohibits a seller from retaining a reversionary interest in a station license.²⁴ We agree with Bernard and reject Petitioners' allegation.

Specifically, the agreements for DBZ's debt financing to DFW Radio and Watch do not provide DBZ a security interest in the stations' FCC license and permit, but, in fact, explicitly exclude the authorizations from the secured collateral.²⁵ Moreover, DBZ is not a former licensee of the stations, re-acquiring the stations through a reversionary interest. Rather, DBZ was the highest bidder at a court-ordered and supervised public auction, open to all interested bidders. The Court subsequently mandated the sale to DBZ, finding that it was in the best interests of the Debtor, the Debtors' estates, their creditors, and interest holders.²⁶

²⁰ 47 U.S.C. § 309(d).

²¹ See *Chet-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041 (1999) (modifying the standard set forth in *Maumee Valley Broadcasting, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3487 (1997), which had required a petitioner to demonstrate *both* residence in the station's service area and that petitioner listens to or views the station); see also *Curators of the University of Missouri*, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 1174 (2001).

²² Petition at 6.

²³ *Kidd Communications v. FCC*, 427 F.3d 1 (D.C. Cir. 2005). In *Kidd*, a state court determined that a promissory note, executed and defaulted upon by the current licensee of a radio station, created a security interest in favor of the former licensee in *both* the station's physical assets and FCC license. Accordingly, the court ordered that the station's license be assigned to the former licensee, and the Commission approved the assignment. The D.C. Circuit, however, vacated and remanded the case, holding that the Commission failed to adequately explain why its general policy on reversionary interests in FCC authorizations did not prohibit the transfer.

²⁴ 47 C.F.R. § 73.1150, which provides that a transferor of a broadcast station license may retain "no right of reversion of the license, no right to reassignment of the license in the future, and may not reserve the right to use the facilities of the station for any period whatsoever." 47 C.F.R. § 73.1150(a).

²⁵ See Objection at Exhibit C, § 2(g); Exhibit D, § 4.1

²⁶ See December 27, 2005, Order at 2.

It is well-established that the Commission will accommodate court decrees unless a public interest determination under the Act compels a different result.²⁷ Accommodation of the Court's Order contravenes neither the Act nor the Rules, including Section 73.1150. Accordingly, we find no reason not to honor the Court's Order and grant the Assignment Application.²⁸

Premature Assumption of Control. The Petitioners further allege that DBZ usurped control over the construction of KHSE(AM) and "froze DFW Radio out of any decision making, or even consent, to actions being taken relative to KHSE."²⁹ Bernard counters that DBZ did not assume unauthorized control of KHSE(AM), but rather acted within the scope of the Court-ordered and supervised process for construction.

In ascertaining whether a prohibited transfer of control has occurred, we have traditionally looked beyond legal title to see whether a new entity or individual has obtained the right to determine basic operating policies of the station.³⁰ Although a licensee or permittee may delegate certain functions on a day-to-day basis, the ultimate responsibility for essential station operations, such as personnel, programming, and finances, is non-delegable.³¹

On their face, the Court Orders regarding the construction of KHSE(AM), as well as the subsequent agreements between DFW Radio and DBZ, comport with Commission policy. The Orders and agreements provide that DBZ will advance the funds for construction and that Patrick, the media broker for DFW Radio, will oversee the station's construction. The terms of the agreements, however, confirm that ultimate control over construction will remain with DFW Radio. Specifically, pursuant to the June 23, 2005, Order, agreed to by DFW Radio, Patrick was delegated authority to supervise construction, select a construction superintendent, and utilize the loan proceeds to pay for construction.³² The Court Orders and subsequent agreements between the parties, however, were also explicit that the "construction contract, the budget for such construction, and all other terms and documents thereto shall be in all respects satisfactory to the Debtors [DFW Radio and Watch]"³³ and that "Zwirn [DBZ] shall not

²⁷ *Arecibo Radio Corp.*, Memorandum Opinion and Order, 101 FCC 2d 545 (1985); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 131-32 (1945).

²⁸ *Compare Kirk Merkley, Receiver*, Memorandum Opinion and Order, 94 FCC 2d 829 (1983), *recon. denied*, Memorandum Opinion and Order, 56 RR 2d 413 (1984), *aff'd sub nom. Merkley v. FCC*, 776 F.2d 365 (D.C. Cir. 1985) (holding that an agreement giving a prior licensee, as a default remedy, the right to regain control automatically of the station and its license, was tantamount to a vested security interest and violated Commission policy, and thus departing from the court's decision).

²⁹ Petition at 12.

³⁰ See *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856, 863 (1969), *aff'd sub nom., Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert denied*, 403 U.S. 923 (1971).

³¹ See, e.g., *WPGR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8145 (1995); *Southwest Texas Public Broadcasting Council*, Letter, 85 FCC 2d 713, 715 (1981).

³² As a debtor-in-possession, DFW Radio was operating under supervision of the Court. The Court-ordered process for construction was intended to ensure the construction and activation of a new AM broadcast station.

³³ June 23, 2005, Order at 1; see also Asset Purchase Agreement ("APA") at 1, attached as Exhibit 10 to Assignment Application ("The construction of Station 700 AM shall be managed by Larry Patrick ... acting on behalf of the Seller and by such authority having Seller's ultimate control and supervision prior to the Final Closing").

be deemed to be in control of the Debtors, the operation of the Debtors, or to be acting as a responsible person with respect to the operation or management of the Debtors and their assets for any purpose.”³⁴

The Petitioners aver that DBZ did not abide by these terms, but rather “pushed DFW Radio aside with respect to control of KHSE” and directed Patrick and Jack Sellmeyer (“Sellmeyer”), the construction superintendent, “not to communicate with nor involve DFW Radio in any aspects of the construction of KHSE.”³⁵ The Petitioners, however, fail to present probative evidence in support of their claim that Petitioner Schum, the manager of DFW Radio, was “blocked from any input in the build out of KHSE [and]... was never in the information loop although Mr. Patrick gave almost daily reports to Zwirn.”³⁶ Indeed, Bernard presents evidence showing that Schum was regularly apprised of the construction of KHSE(AM), receiving calendars of the construction timeline, frequent e-mail updates, and progress reports.³⁷ Further, while the Petitioners allege that Sellmeyer and DBZ attempted to unilaterally modify the KHSE(AM) construction permit, the Petitioners acknowledge, and the record shows, that DFW Radio exerted its control to block that effort, and a FCC Form 301 modification application was never filed.

While it is undisputed that DBZ funded the construction of KHSE(AM) and received updates from Patrick on the progress of construction,³⁸ there is no evidence that DBZ usurped control over construction, as the Petitioners allege. Accordingly, we find that Petitioners have not established a *prima facie* case that DBZ engaged in an unauthorized transfer of control of KHSE(AM).

Abuse of Process. Petitioners next claim that DBZ abused the Commission’s processes when its counsel threatened Schum with legal action when he attempted to exercise control over the KHSE(AM) construction.³⁹ Bernard counters that the Court Order prohibited Schum from hindering, interfering with, or attempting to delay Patrick’s efforts to oversee the construction of KHSE(AM).⁴⁰ Bernard claims Schum violated the Court Order’s provisions by contacting the Federal Aviation Administration directly and requesting alteration of the antenna structure registrations associated with the KHSE(AM) towers. In response, counsel for DBZ sent an e-mail to Schum’s counsel expressing concern about this violation,

³⁴ See July 20, 2005, “Final Order Authorizing Postpetition, Secured, Superpriority Financing” at 8; see also Section 5.2 of APA (“Prior to the Final Closing Date, Buyer shall not, directly or indirectly, control, supervise, direct, or attempt to control, supervise, or direct the operation of the Stations and all such operation, including complete control and supervision of all of the Station’s programs, employees, and policies shall be the sole responsibility of Seller until the Final Closing Date ...”).

³⁵ Petition at 7-8.

³⁶ Reply at 6.

³⁷ See Exhibit I to Opposition.

³⁸ The Commission has permitted prospective purchasers to furnish funds and act in varying management capacities in order to assure continuance of service. See, e.g., *Daniel Forrestall, Receiver*, Memorandum Opinion and Order, 8 FCC Rcd 884 (MMB 1993); see also *Choctaw Broadcasting Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 8534 (1997) (advancement of funds by prospective purchaser for station construction did not evidence control of station finances).

³⁹ Petition at 13. According to Petitioners, “not only was this threat sleazy in the extreme, the threat violated established case law, and must expose the party on whose behalf the threats were made as *prima facie* unqualified to be a Commission license.”

⁴⁰ See Exhibit A to Opposition at 3 (“Neither David A. Schum nor any other insider of the Debtors shall in any way interfere, hinder, or attempt to delay Mr. Patrick’s activities with respect to the funds so advanced by Zwirn and the construction activities related to station AM 700”).

stating that actions with respect to construction should be taken through the debtors' court-appointed professionals.⁴¹

Initially with regard to this allegation, it is unclear how the communication in any way involves, let alone abuses, Commission processes. Moreover, even were we to consider the September 9, 2005, e-mail to be tangentially related to Commission processes, we find that there is nothing objectionable about it. The Commission has stated that abuse of process is a "broad concept that includes use of Commission process to achieve a result that the process was not intended to achieve, or use of that process to subvert the purpose the process was intended to achieve."⁴² In its Order on character qualifications, the Commission further defined "abuse of process" as "serious willful misconduct that directly threatens the integrity of the Commission's licensing processes."⁴³

We find no merit to the allegation that DBZ was committing an abuse of the Commission's processes. The e-mail sent by DBZ's counsel was not an improper threat, but rather a good faith effort to protect DBZ's financial interest and ensure construction of the station.⁴⁴ DBZ was acting in accordance with the Court Order, and its actions neither evidence an improper motive nor subvert Commission processes. Accordingly, we reject the argument that DBZ's "threat" amounted to an actionable abuse of Commission processes.

Foreign Ownership. Finally, the Petitioners assert that Bernard failed to disclose ownership information about DBZ, its principal equity owner, and there is thus "no way of objectively knowing (other than taking Zwirn's word for it)"⁴⁵ whether Bernard complies with the foreign ownership restrictions of Section 310 of the Act.⁴⁶ In its ownership exhibit to the Assignment Application, Bernard certified that DBZ, which holds the majority of the equity, but no voting interest, in Bernard's parent company is "insulated from involvement in the LLC's media enterprises pursuant to FCC requirements"⁴⁷

⁴¹ See Exhibit J to Opposition. The September 9, 2005, e-mail, from counsel for DBZ to counsel for Watch, reads as follows:

Although having Schum's input on certain matters is helpful, I don't believe it is appropriate for him to contact the FAA, the FCC, or any other agency directly. The Debtors need to take actions through their court-appointed representatives. If Schum feels that communication is necessary, he needs to come through you . . . This type of direct communication is not appropriate and is in direct violation of the Court's Order. Please let Dave know that this type of conduct is improper, and that future violations will be addressed with the Court.

⁴² See *In The Matter of Saga Communications of New England, Inc.*, Notice of Apparent Liability, 19 FCC Rcd 2741 (EB 2004); *Ronald Brasher*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 15 FCC Rcd 16326, 16331 (2000) (citing *Broadcast Renewal Applicants*, Second Further Notice of Inquiry and Notice of Proposed Rule Making, 3 FCC Rcd 5179, 5199 n.2 (1988)).

⁴³ See *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1211 (1986).

⁴⁴ See *Fort Collins Broadcasting Co., Inc.*, Memorandum Opinion and Order, 38 FCC 2d 707, 711-12 (1972) (Commission found that the licensee was not committing an abuse of process, but was simply "acting like any other potential litigant [who] believed in good faith that it could advise [petitioner] that it might file suit").

⁴⁵ Reply at ii.

⁴⁶ 47 U.S.C. § 310(a-b).

⁴⁷ See Assignment Application at Attachment 11. According to Bernard, the LLC agreement of its parent company, Bernard Radio LLC, contains provisions insulating DBZ from involvement in media-related activities.

and thus exempt from attribution.⁴⁸ Moreover, Bernard certified in the Assignment Application that it complies with the alien ownership restrictions and subsequently submitted a declaration, under penalty of perjury, from Steven F. Campbell, a Vice President of DBZ, attesting that “[t]here is no direct or indirect foreign equity or voting ownership in Bernard Dallas LLC. This includes equity investments in D.B. Zwirn Special Opportunities Fund, L.P., an insulated member of Bernard Dallas’s direct parent.”⁴⁹ The Petitioners present no rebuttal evidence, and we thus reject their speculative foreign ownership allegations.

Conclusion

Based on the evidence presented in the record, we find that the Petitioners have not raised a substantial and material question of fact warranting further inquiry. We further find that Bernard Dallas LLC is qualified as an assignee and that grant of the Assignment Application is consistent with the public interest, convenience, and necessity.⁵⁰ Accordingly, IT IS ORDERED, That the application to assign the license of Station KFCD(AM), Farmersville, Texas (File No. BAL-20060117ACU) and the construction permit of Station KHSE(AM), Wylie, Texas (File No. BAP-20060117ACV) from DFW Radio License, LLC to Bernard Dallas LLC, IS GRANTED, subject to the condition that the KFCD(AM) transaction may not be consummated prior to the grant of the pending license renewal application for KFCD(AM). IT IS FURTHER ORDERED, That the February 23, 2006, Petition to Deny filed by David A. Schum et al. IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Dennis J. Kelly, Esq.
Gregory L. Masters, Esq.

⁴⁸ See 47 C.F.R. § 73.3555, Note 2(f)(1) (“An interest in a LLC shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies”). Bernard supplied the requisite certification regarding the insulation of DBZ.

⁴⁹ See Exhibit K to Opposition.

⁵⁰ Petitioners have advised that Schum has appealed the result of the auction in a Texas state court. Accordingly, we emphasize that our decision to grant the Assignment Application merely finds that the parties are qualified under, and the proposed transactions do not violate, the Communications Act of 1934, as amended, and the Commission’s rules and policies. As such, it is permissive only and does not prejudice the outcome of the court proceeding and any relief to which the parties are entitled under the civil suit.