Federal Communications Commission
Washington, D.C. 20554

DA 07-1698
Released: April 13, 2007

Margaret L. Tobey, Esq.
Morrison and Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, DC 20006

J. Steven Rich, Esq.
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, DC 20005

Re: Application for Renewal of License
KAZA-TV, Avalon, California
File No. BRCT-20060811ARB
Facility ID No. 29234

Counsel:

On November 30, 2006, NBC Telemundo License Co. ("NBC Telemundo") filed an Informal Objection, which it supplemented on December 8, 2006, opposing the license renewal application of Pappas Southern California Licensee, LLC ("Pappas"), licensee of Station KAZA-TV, Avalon, California. Both Pappas and Station KAZA-TV's primary program supplier, Mexican corporation TV Azteca, S.A. de C.V. ("TV Azteca"), filed oppositions on or about January 11, 2007, and NBC filed a Consolidated Reply to Oppositions on March 7, 2007. For the reasons set forth below, we deny the Informal Objection.

Background. NBC Telemundo argues that TV Azteca lacks the character qualifications to hold a cognizable interest in a broadcast licensee as a result of various securities violations and anticompetitive conduct occurring in Mexico. The allegation of securities law violations stem from a related-party transaction between TV Azteca's cell phone subsidiary, Unefon, and a private entity created by TV Azteca's Chairman of the Board of Directors and controlling shareholder, Ricardo Salinas Pliego.[1] NBC Telemundo contends that TV Azteca filed false reports with the U.S. Securities and Exchange Commission ("SEC"), as well as made statements to analysts and the public, that allegedly concealed Mr. Pliego's involvement in the transaction.

NBC Telemundo states that, as a result of these actions, shareholders commenced a class-action lawsuit in late 2004, and the SEC subsequently filed suit for violations of securities laws,

[1] *NBC Telemundo Informal Objection*, at 9.

including civil fraud and insider trading. According to NBC Telemundo, the Mexican Banking and Securities Commission also commenced a regulatory action in January 2005, and imposed $2.3 million in fines. NBC Telemundo further states that, "according to published reports, Mexican Finance Secretary Francisco Gil Diaz asked prosecutors to bring criminal charges against Salinas for his sale of TV Azteca shares based on inside information."[2] NBC Telemundo alleges that, in response to the SEC charges and the shareholder suit, Mr. Pliego caused "the board of directors of TV Azteca to vote to delist the company from trading on the New York Stock Exchange as of July 18, 2005,"[3] and that Mr. Pliego and other TV Azteca principals avoided U.S. travel to prevent service of process. On September 14, 2006, the SEC filed a consent decree settling the securities-related charges in exchange for payment of $8.5 million. The consent decree further enjoined TV Azteca and Mr. Pliego from future violations of certain provisions of the Securities Act of 1934, and barred Mr. Pliego from serving as an officer or director of a U.S. public company for a period of five years, except under certain limited circumstances. The shareholder action remains pending.

With respect to the allegation of anticompetitive conduct, NBC Telemundo explains that it has sought to expand its operations in Mexico by giving "Mexican entities the opportunity to purchase time on Telemundo's networks in the United States," and by pursuing joint ventures in Mexico, including plans to build a studio in Mexico and to establish a Mexican television network.[4] On August 17, 2006, TV Azteca filed suit in the United States District Court for the Southern District of Florida alleging that it had an exclusive "image" license with respect to the actor Alan Tacher, whom NBC Telemundo had hired as the host of its new television show *Quinceanera*. According to NBC Telemundo, TV Azteca subsequently filed a complaint in the Fifth Civil Court of Mexico City seeking to enjoin production of *Quinceanera*. NBC Telemundo alleges that none of the defendants in the U.S. action were served with the complaint, and that TV Azteca did not inform NBC Telemundo or the U.S. District Court of the pending action in Mexico. NBC Telemundo further states that "[a]t a September 5, 2006, status conference, TV Azteca, through its counsel, falsely informed the court that TV Azteca and Tacher were engaged in settlement discussions and requested a continuance of the preliminary injunction hearing."[5]

According to NBC Telemundo, TV Azteca acquired its desired relief in the Mexican court in the form of an *ex parte* order while the U.S. case was pending. TV Azteca then allegedly acquired two additional *ex parte* orders from the Mexican court, one authorizing service of process outside normal business hours, and a second "authorizing the use of public force (i.e., official police) to protect the court clerk when he attempted to serve the order."[6] NBC Telemundo alleges that TV Azteca acquired these orders without notice to it, the production company responsible for *Quinceanera*, or the U.S. District Court. NBC Telemundo maintains that TV Azteca, nevertheless, went beyond the specific authorization provided in the *ex parte* order. NBC Telemundo states that Auxiliary Mexico City Police and TV Azteca's private security employees arrived at the studio where *Quinceanera* was being produced to serve the

---

[2] *Id.* at 12.

[3] *Id.* at 11.

[4] *Id.* at 14.

[5] *Id.* at 15.

[6] *Id.* at 16.

order and halt production. In addition to the law suits involving the production of *Quinceanera*, NBC Telemundo cites other examples of alleged intimidation to exclude competition in Mexico, including the filing of a criminal complaint to prevent GE Mexico from extending a lawful loan to a Mexican television station.

In its Supplement to Informal Objection, NBC Telemundo states that "nothing in its filing raises any question about the qualifications of Pappas Telecasting or any of its principals to hold an FCC license."[7] However, it maintains that TV Azteca's interest in Pappas is cognizable for purposes of determining compliance with the broadcast multiple ownership rule since Azteca International, a subsidiary of TV Azteca, acquired an option to purchase Station KAZA-TV for a total purchase price of $250 million; loaned Pappas $129 million; and entered into a Local Marketing Agreement with Pappas and Station KAZA-TV. NBC Telemundo states that since TV Azteca's interest is cognizable, its character is relevant to this proceeding. NBC Telemundo argues, however, that the Commission could grant the license renewal application conditioned upon "elimination of TV Azteca's cognizable interest in the Station by a date certain through the termination of the LMA, the elimination [TV Azteca's] EDP interest and elimination of the Azteca affiliation."[8]

Pappas responds that, even were TV Azteca's interest in Station KAZA-TV cognizable, the "Commission has never before applied the broadcast character policies to an entity that has only a creditor/program supplier relationship with a licensee."[9] Pappas further states that the securities violations alleged by NBC Telemundo are not the "type[] of violation that the Commission has said it will normally consider under its character policies," and that the alleged violations at issue were settled by consent decree and, thus, cannot be considered in evaluating TV Azteca's character.[10] With respect to the alleged anticompetitive conduct occurring in Mexico, Pappas states that the media reports upon which NBC Telemundo relies, even if true, do not indicate that the activities were a crime or other form of misconduct under Mexican law, and that such a determination is not within the FCC's jurisdiction and expertise. Pappas states that, in any case, neither the alleged securities violations nor the alleged misconduct in Mexico are "so egregious as to shock the conscience" and, thus, neither allegation justifies Commission intervention absent adjudication in the proper forum.[11]

TV Azteca argues that NBC Telemundo, by filing the Informal Objection, is seeking to bar it from "offering a competitive Spanish-language television network in the U.S." because of problems NBC Telemundo has experienced in establishing a new television network in Mexico.[12] TV Azteca contends that its relationship with Pappas as a program supplier and debt holder does not provide a strong jurisdictional basis to redress the alleged competitive imbalance between the U.S. and Mexican television markets. TV Azteca states that the allegations raised

[7] *Supplement to Informal Objection*, at 3

[8] *Supplement to Informal Objection*, at 3.

[9] *Pappas Opposition*, at 5.

[10] *Id.* at 16.

[11] *Id.* at 18.

[12] *TV Azteca Opposition*, at 2.

by NBC Telemundo are not cognizable under the Commission's character policy because "each involves unadjudicated conduct," is not the kind of conduct the Commission has stated would be considered under the character policy, and "is supported only by hearsay."[13] TV Azteca states, in particular, that the $2.3 million fine imposed by the Mexican Banking and Securities Commission is currently under *de novo* review by the Mexican Federal Tax and Administrative Justice Court. TV Azteca concludes that there is "no rational basis for NBC's insistence that the Commission interject itself into the various ongoing private disputes between the parties that are centered in Mexico."[14]

In its reply, NBC Telemundo argues that "Pappas never reported [TV Azteca's] attributable interest to the Commission, as required by the rules, and TV Azteca has never filed the required ownership reports apprising the Commission of the nature and extent of its attributable ownership interest in [Station KAZA-TV]."[15] NBC Telemundo states that TV Azteca has also failed to report required ownership information to the SEC, which it claims is "strikingly similar to TV Azteca's failure to report its attributable interest in [Station KAZA-TV]."[16] NBC Telemundo reiterates that TV Azteca's character qualifications may be reviewed by the Commission because it holds a cognizable interest in Station KAZA-TV under the equity/debt plus attribution standard.

NBC Telemundo contends that the securities charges involve fraudulent statements to governmental authorities and, thus, can be considered even if the charges are civil and not criminal. NBC Telemundo further argues that the policies established in the 1986 *Character Policy Statement* are meant as a guide and that, even though the Commission does not generally consider misconduct that has been settled by consent decree, it has the discretion to consider such conduct if the circumstances warrant. NBC Telemundo argues that the Commission should exercise its discretion in this instance because of statements made by TV Azteca during and after the SEC investigation, and because "TV Azteca has exhibited a pattern and practice of making misrepresentations to and failing to file required disclosures with governmental agencies, including the SEC and the FCC."[17] NBC Telemundo argues that this case presents an instance where the misconduct is so egregious as to shock the conscience and, thus, warrants intervention prior to a final adjudication on the merits. NBC Telemundo requests, in the alternative, that the Commission condition grant of the license renewal application on the outcome of the various proceedings involving TV Azteca's non-FCC misconduct, specifically the litigation involving the production of "Quinceanera" and the *de novo* review of the fine levied by the Mexican Banking and Securities Commission.

Discussion. Section 309(k)(1) of the Communications Act of 1934 (the "Act") states that the Commission shall grant a license renewal application if it finds, with respect to that station, that (a) the station has served the public interest, convenience, and necessity; (b) there have been

---

[13] *Id.* at 5.

[14] *Id.* at 6.

[15] *Id*.

[16] *Id.* at 18.

[17] *Id.*.

no serious violations by the licensee of the Act or Commission rules and regulations; and (c) there have been no other violations by the licensee of the Act or the rules or regulations of the Commission which, taken together, would constitute a pattern of abuse.[18]

The Commission has stated that a finding regarding an applicant's character qualifications "is not an end in itself," but, rather, "a step in the process of evaluation by which the Commission determines whether the public interest would be served by grant of the application before it."[19] To designate an application for hearing on the basis that grant would not be in the public interest, a petition to deny must contain specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.[20] This first step of the public interest analysis "is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established."[21] If the petition meets the first step, the Commission will designate the application for hearing if the allegations, together with any opposing evidence before the Commission, raise a substantial and material question of fact as to whether grant would serve the public interest, or if the Commission is otherwise unable to conclude that granting the application would serve the public interest.[22]

In 1986, the Commission revised its character policy, stating that it would henceforth shift its focus from a broad ranging inquiry into character to one more "narrowly focused on specific traits which are predictive of an applicant's propensity to deal honestly with the Commission and comply with Communications Act and the Commission's rules and policies."[23] Specifically, the Commission stated that it would generally limit its consideration to "non-FCC misconduct involving criminally fraudulent misrepresentations, alleged criminal activity and antitrust or anticompetitive misconduct."[24] The Commission also stated that it would also consider civil judgments in assessing the character of an applicant, but that those "relating to fraudulent misrepresentations to a governmental unit or mass media related violations of antitrust or anticompetitive laws bear most directly on an applicant's qualification to be a broadcast

[18] 47 U.S.C. §309(k)(1).

[19] *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179 (1986) (subsequent history omitted) ("*Character Policy Statement*"). In implementing Section 309(k) of the Act, the Commission stated that it "would continue to apply existing policy statements and case law, refining these as appropriate on a case-by-case basis, in interpreting the statutory terms that govern the renewal process." *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996*, 11 FCC Rcd 6363. 6364 (1996). We find, therefore, that the Commission's character policy is relevant in determining whether grant of a license renewal application would comply with Section 309(k) of the Act.

[20] 47 U.S.C. §309(d)(1); *Astroline Communications Co. Ltd. Partnership v. FCC,* 857 F.2d 1556 (D.C. Cir. 1988) ("*Astroline*").

[21] *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

[22] *Astroline*, 857 F.2d at 1561; 47 U.S.C. §309(e).

[23] *Character Policy Statement*, 102 FCC 2d at 1186.

[24] *Id.* at 1205.

licensee."[25] As to allegations of non-FCC misconduct, the Commission stated that it "lack[ed] the expertise and the resources to interpret other statutes and to make value judgments about behavior unrelated to the broadcast licensing function."[26] Thus, the Commission will not generally consider unadjudicated allegations in its character inquiry, unless the "nonbroadcast misconduct [is] so egregious as to shock the conscious and evoke almost universal disapprobation." [27] We conclude that none of the conduct at issue is disqualifying.

The SEC investigation of pending securities law violations has been settled. Consent decrees are not considered adjudicated misconduct for purposes of determining an applicant's character.[28] The shareholder suit also remains pending. In its reply, NBC Telemundo alleges that TV Azteca failed to file a required Schedule 13D with the SEC disclosing the percentage of TV Azteca shares held by Mr. Salinas. We find this bare allegation insufficient to justify Commission action in the absence of a final decision by an agency or court with specific expertise in the area.

With respect to potential investigations by Mexican authorities, NBC Telemundo cites a news report in alleging that the Mexican Finance Secretary has asked prosecutors to bring criminal charges for insider trading. Not only is it unclear whether any such charges were ever officially filed, but the news reports upon which NBC Telemundo brings these allegations are hearsay and, thus, not reliable evidence.[29] Even were such charges filed, there is no indication that they have been adjudicated by a court in Mexico, and we cannot conclude that they are "so egregious as to shock the conscience."[30] NBC Telemundo does cite a fine imposed by a Mexican regulatory agency, but, as TV Azteca points out, the regulatory agency's ruling is under *de novo* review. The Commission has stated that it is only appropriate to consider as "adjudicated" decisions reached by an ultimate trier of fact, and that "[t]ribunals whose factual determinations may be reviewed *de novo* will not be considered unless the time for taking such review has expired under the relevant procedural rules."[31] We decline to condition any decision on the license renewal application upon the outcome of the pending regulatory action in Mexico as TV Azteca has failed to demonstrate how the conduct at issue, even were it to be fully adjudicated in Mexico, would fit within the specified kind of non-FCC misconduct relevant for a character determination.

---

[25] *Policy Regarding Character Qualifications in Broadcast Licensing*, Order on Reconsideration, 6 FCC Rcd 3448 (1991) (subsequent history omitted).

[26] *Character Policy Statement*, 102 FCC 2d at 1187.

[27] *Id.* at 1205, n. 60.

[28] *Id.* at 1205.

[29] *Pikes Peak Broadcasting Company, Inc.*, 12 FCC Rcd 4626, 4630 (1997). *See also RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Rothschild Broadcasting Company, Inc.*, 10 FCC Rcd 7226, 7227 (1995); *Post-Newsweek Stations, Florida, Inc.*, 49 FCC 2d 92 (Rev. Bd. 1974).

[30] *Compare Contemporary Media, Inc.*, 13 FCC Rcd 14437,14446 (1998) (concluding that a conviction involving repeated sexual abuse of children constitutes an independent basis for disqualification).

[31] *Character Policy Statement*, 102 FCC 2d at 1205, n. 61.

With respect to the allegations surrounding the pending litigation over production of the program *Quinceanera*, the Commission generally "does not assume 'jurisdiction in contractual controversies…recognizing that such matters are generally private in nature and appropriately left to local courts for resolution.'"[32] TV Azteca is not a Commission licensee, and the actions at issue did not take place within the territorial jurisdiction of the FCC. Commission intervention in this private dispute is not appropriate unless and until a court of competent jurisdiction makes a final determination as to specific allegations of anticompetitive misconduct. As NBC Telemundo has cited no specific violation of antitrust or competition laws as a result of the dispute, we see no reason to condition disposition of the instant application on the outcome of the pending litigation.

NBC Telemundo acknowledges that Pappas's character qualifications as licensee of Station KAZA-TV are beyond dispute. We need not determine here whether TV Azteca's interest in Pappas renders it subject to the character policy as we find no disqualifying conduct. We, therefore, will not condition our action on the license renewal application upon TV Azteca and Pappas severing their business relationship. NBC Telemundo does, however, raise a number of issues regarding TV Azteca's alleged failure to disclose its interest in Pappas. A review of the Commission's relevant database indicates that Pappas listed the various contracts with TV Azteca in its relevant FCC Form 323 Ownership Reports. NBC Telemundo contends that Pappas did not specifically certify that TV Azteca holds an attributable interest in Pappas, and that TV Azteca failed to file a separate ownership report disclosing this interest.

Under the equity/debt plus attribution standard, the Commission will attribute financial interests amounting to over 33% of the total assets of a mass media entity where the interest holder is either a major program supplier to the entity or a same-market media entity.[33] NBC Telemundo argues that the total asset value of Station KAZA-TV is the $250 million exercise price contained in the option agreement and that TV Azteca's loan of $129 million to Pappas exceeds the threshold of 33% of Station KAZA-TV's total assets. Pappas states that it is not clear whether the interest is attributable under the equity/debt plus attribution standard since the option agreement expired by its terms on January 1, 2006. Since the option was never exercised, according to Pappas, it cannot be assumed that any eventual sales price is the same as the option price.

The Commission has stated that "in connection with a transfer or assignment application or an ownership report filed after consummation of a transfer or assignment, the applicant must use the sales price of that transfer or assignment as the total asset value."[34] There is no assignment or transfer of control application at issue here. In this case, "an applicant may base the valuation of a station on either the book value as defined under standard financial accounting practices, or some other value, including the fair market value, provided the valuation is

---

[32] *USA Broadcasting, Inc.*, 19 FCC Rcd at 4256, *citing McCalister Television Enterprises, Inc.*, 60 R.R.2d 1379, 1383-84 (1986).

[33] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559, 12579 (1999).

[34] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097, 1111 (2001).

reasonable."[35] Thus, the option price agreed to by Pappas and Azteca does not necessarily represent the total asset value of Station KAZA-TV for purposes of applying the EDP attribution standard. Even assuming the option price as the total asset value of Station KAZA-TV, we find no intent to deceive. To demonstrate intent, NBC Telemundo would have to show both "the fact of misrepresentation" and "proof that the party making it had knowledge of its falsity."[36] Pappas disclosed the various agreements with TV Azteca in its relevant ownership reports.

Accordingly, NBC Telemundo's Informal Objection, as supplemented, **IS DENIED**.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc: Richard Cotton, Esq.
NBC Telemundo License Co.
30 Rockefeller Plaza
New York, NY 10112

TV Azteca, S.A. De C.V.
c/o Patrick S. Campbell, Esq.
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1615 L Street, N.W.
Suite 1300
Washington, DC 20036

Peter C. Pappas, Esq.
Executive Vice President
Legal and Government Affairs
Pappas Telecasting Companies
875 15th Street, N.W.
Washington, D.C. 20005

[35] *Id.*

[36] *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991), *quoting Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980).