



Federal Communications Commission
Washington, D.C. 20554

DA 10-1811

Released: September 24, 2010

Una Vez Mas Texas Holdings, LLC
c/o Kathleen A. Kirby, Esq.
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006

Johnson Broadcasting, Inc., *et al.*
c/o Arthur V. Belendiuk, Esq.
Smithwick & Belendiuk, P.C.
5028 Wisconsin Ave., NW, Suite 301
Washington, DC 20016

Spanish Broadcasting System, Inc.
c/o Howard W. Liberman
Drinker Biddle & Reath LLP
1500 K St., NW
Washington, DC 20005

Re: Applications for the Assignment of License of
KNWS-TV, Katy, Texas, ID No. 31870, and
KLDT(DT), Lake Dallas, Texas, ID No. 17433,
File Nos. BALCT-20091229ACT and ACZ

Dear Counsel:

This is in regard to the applications for the assignment of license of television station KNWS-TV, Katy, Texas, from Johnson Broadcasting, Inc., Debtor-in-Possession, to Una Vez Mas Texas Holdings LLC ("UVM")¹ and for assignment of license of television station KLDT(DT), Lake Dallas, Texas² from Johnson Broadcasting of Dallas, Inc., Debtor-in-Possession, to UVM.³ A petition to deny the applications was filed by Spanish Broadcasting Systems, Inc. ("SBS"). Johnson and UVM filed oppositions and SBS filed a reply. For the reasons stated below, we deny the petition and grant the applications.

Background. UVM states that it is an experienced broadcaster and is the parent company of several Commission licensees and the operator of 31 low power television stations. The acquisition of KNWS-TV and KLDT(DT) would represent its first full-power television station acquisitions. UVM also states

¹ File No. BALCT-20091229ACT.

² File No. BALCT-20091229ACZ.

³ Johnson Broadcasting, Inc., Debtor-in-Possession and Johnson Broadcasting of Dallas, Inc., Debtor-in-Possession will be collectively referred to as "Johnson."

that it is the largest broadcast affiliate group of the Azteca America television network, with which it has had an almost ten-year relationship.

In October 2008, Johnson entered into bankruptcy proceedings. According to the record, UVM made its first offer for the stations during the pendency of the bankruptcy proceedings in December 2008 and continued its efforts until it became the last “stalking horse bidder” in the ongoing proceedings on October 27, 2009. UVM states that it used its contacts with Azteca International Corporation (“AIC”) to explore the possibility of obtaining debt financing for the transaction through Banco Azteca, S.A. (“Banco Azteca”). Both AIC and Banco Azteca are subsidiaries of the Mexican company Grupo Elektra, S.A. DE C.V. (“Grupo Elektra,” and with Banco Azteca and AIC, the “Azteca Parties.”) AIC owns the Azteca America television network, which provides Spanish-language programming for a number of television stations located in the United States, including several stations owned by UVM.

UVM states that its negotiations with Banco Azteca ultimately resulted in a conditional commitment letter to support its attempt to acquire the stations owned by Johnson. UVM states that this letter provided for financing of the transaction up to a stated dollar amount and was based on its ongoing discussions with Johnson, its participation in the bankruptcy proceedings, UVM’s valuation of the stations, and UVM’s belief that it would be the only bidder. UVM claims that the financing commitment had to be revisited during the week preceding the bankruptcy auction and during the auction itself once SBS emerged as a competing bidder. UVM has submitted an executed copy of the Amended Commitment Letter issued by Banco Azteca on December 22, 2009.⁴

In the applications, UVM states that AIC will hold an attributable interest in both of the stations. The basis for this attributable interest will be that the Banco Azteca will provide virtually all of the financing for the stations and that Azteca America will provide a substantial amount of the station’s programming. Under the Commission’s equity/debt-plus (“EDP”) attribution standard, the holder of an equity and/or debt interest in a media outlet shall have that interest attributed if it exceeds more than 33% of the combined equity and debt interests in that media outlet and the holder of the interest supplies more than 15% of the total weekly broadcast programming hours of the station in which the interest is held.⁵ Although UVM does not specify the exact EDP ratio at issue, it concedes that the Azteca Parties will have an attributable interest in the stations under the EDP standard.

In its petition to deny, SBS alleges that UVM’s conduct during the bankruptcy auction indicates that the Azteca Parties were in control of UVM’s actions during the proceeding. Specifically, SBS states that Martin Breidspecher, the Chief Operating Officer of Azteca America, was present at the auction as one of the representatives of UVM. With its petition to deny, SBS includes a portion of the transcript of the bankruptcy proceeding which records its objection to Mr. Breidspecher’s participation, citing concerns about Azteca’s participation in the auction and questions of foreign ownership and control. According to the transcript the objection was noted and the auction proceeded. In addition, SBS states that there were eight instances, following SBS’ bids, in which UVM’s representatives requested recesses to “caucus.” According to SBS, when it requested that these breaks be limited to 30 minutes, UVM’s counsel explained that they were “communicating with people outside the country.”⁶ The transcript indicates that UVM emerged as the highest bidder at the conclusion of the auction. SBS takes the position that the

⁴ UVM Opposition, Attachment 1.

⁵ See 47 C.F.R. § 73.3555, Note 2(i)(2)(i).

⁶ SBS Petition to Deny at 4.

history of UVM's selection as the winning bidder in the public auction reveals that the Azteca Parties exert *de facto* control over UVM.

SBS also argues that we should treat Banco Azteca's loan to UVM as an equity interest in the licensee. SBS bases its argument on the fact that the Azteca Parties will hold an attributable interest in the licensee because AIC will be a major program supplier to the station and Banco Azteca will provide almost all of the financing for the transaction. Because the Azteca Parties are alien-controlled, SBS argues that we should apply the standard set out in *Fox Television Stations, Inc.* ("*Fox II*"), which set forth criteria to evaluate whether a debt relationship should be deemed an equity interest, "in assessing compliance with Section 310(b)." In conducting this evaluation, *Fox II* held that, "we must examine the economic realities of the transactions under review and not simply the labels attached by the parties..."⁷ As SBS points out, *Fox II* set out certain criteria, borrowed from federal tax law, that the Commission would look at as helpful comparisons (although not controlling for Communications Act purposes) in analyzing such transactions, including (1) whether there is a written unconditional promise to repay the money on demand and to pay a fixed rate of interest; (2) whether there is subordination to or preference over any indebtedness of the company; (3) the company's debt-equity ratio; (4) whether the alleged debt is convertible to stock; and (5) the relationship between the holdings of stock in the corporation and holdings of the interest in question.⁸ SBS argues that, based on *Fox II*, we must review all of the loan agreements and related documents between UVM and the Azteca Parties in order to meaningfully evaluate the Azteca Parties' interests in UVM and whether they comply with Section 310(b).

SBS further argues that, even without reviewing the documents in question, the fifth *Fox II* factor is implicated because Banco Azteca acted in the role of a corporate owner during the auction rather than as a lender. SBS contends that UVM could not make any meaningful decisions during the auction without Banco Azteca's approval and that UVM asked that the auction be stopped eight times so that it apparently could communicate with its lender "outside the country." SBS contends this conduct suggests that financing is tantamount to ownership. SBS further asserts that AIC will control virtually all of the stations' programming and will most likely sell all of their commercial time. SBS contends that by providing financing, programming, and selling commercial time, the Azteca Parties will control the stations' finances and programming and that this mandates a finding that they are in *de facto* control of the station.

In its opposition, UVM states that its actions during the bankruptcy auction provide no factual basis for the petition. UVM states that, in addition to its own principals and Mr. Breidspecher, it had a representative of GulfStar, a private equity investor, present during the auction to assess value and discuss alternatives. UVM contends that it made a strategic decision to slow down the pace of the auction to assess and reassess its position and also that it contacted representatives of Banco Azteca on four separate occasions. UVM avers that on three of these occasions, its bids had exceeded the level of the bank's financing commitment and on one occasion it was alerting the bank that it had prevailed at the auction. UVM argues that these contacts with Banco Azteca during the auction would not have been necessary if the Azteca Parties controlled UVM because Mr. Breidspecher, the Chief Operating Officer of AIC was already present at the auction. On the other hand, if the transaction was truly arms length, UVM argues that it would be reasonable for it consult with its lender to ensure that the bank would finance the purchase at the higher price. UVM states that the only other relevant factor noted in the petition is that

⁷ *Fox Television Stations.*, 11 FCC Rcd 5714, 5719 (1995) (concluding that debt interest at issue in determining compliance with foreign ownership benchmark was more properly characterized as equity capital contribution.)

⁸ *Fox II*, 11 FCC Rcd at 5720.

the stations' will be Azteca affiliates and that is fully disclosed in the application and provides no basis for a finding that the Azteca Parties will exercise *de facto* control over the stations. UVM states that its network affiliation agreement with Azteca provides that the station licensee will retain ultimate control over all programming decisions in accord with Commission requirements.⁹ UVM also states that, contrary to SBS' assertions, Azteca will not program the station full-time. Instead UVM states that it will supply programming between 12 Midnight and 11 a.m. and for up to another 2 hours per day. In addition, UVM contends that it will sell all local advertising and will use independent representation for the sale of the stations' paid programming.

Furthermore, UVM notes that none of the Azteca Parties will have any equity interest in the stations and argues that there is no basis for the Azteca Parties' debt interest to be treated as equity. UVM states that the Amended Commitment Letter includes an unconditional promise to repay the funds advanced by a date certain and at a fixed rate of interest. UVM goes on to state that the bank has lien priority as would be expected in an arm's length transaction as a conventional first-lien secured lender, and its debt interest is not convertible to stock. UVM concedes that the agreements do provide Banco Azteca with warrants to purchase up to 50% of the common stock of the UVM subsidiary purchasing the Houston station and up to 25% of the common stock of the subsidiary purchasing the Dallas station. UVM notes, however, that the Commission has considered warrants to be future interests that are not attributable until exercised¹⁰ and that the Banco Azteca warrants cannot be exercised unless ownership of the stock in question would comply with the Commission's foreign ownership limitations. UVM acknowledges that the Azteca Parties will have the right to appoint either an observer or a director to the boards of directors of each licensee subsidiary and the guarantor entity created in connection with the transaction, but points out that any director so appointed would be only one of at least five directors.

UVM argues that the Commission should not "depart from its normal procedures" and request all of the loan agreements between UVM and Banco Azteca. UVM states that the substance of the relevant terms is provided in the Summary of Terms and Conditions ("Terms Sheet") attached to the Amended Commitment Letter, which are still under negotiation. UVM asserts that it will file those documents following consummation of the proposed transactions. UVM goes on to argue that SBS's petition is an anticompetitive attempt to gain another opportunity to acquire the stations, potentially at a significantly lower price. UVM states that this conduct disserves the public interest and jeopardizes the continued operation of the stations.

In its reply, SBS contends that the Terms Sheet confirms both that Banco Azteca has agreed to provide over 97 percent of the financing for the transaction and that the Azteca Parties have *de facto* control over the licensee. First, SBS refers to the condition in the Terms Sheet that "[n]ew Affiliation Agreements in form and substance reasonably satisfactory to the Bank shall be entered into between Azteca International Corporation and the Operating Subsidiaries" as evidence of the Azteca Parties' control over the stations' programming. SBS argues that it is likely that there would be harsh financial penalties should UVM attempt to withdraw from the affiliation agreement before the loan is repaid, although it does not point to any actual evidence of such penalties. SBS cites the Audio Division's recent decision in *Rocking M Radio, Inc.*¹¹ for the proposition "programming agreements having a perpetual term are facially

⁹ Citing, e.g., *Network Affiliate Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling*, 23 FCC Rcd 13610, 13611 (2008).

¹⁰ *Citing Review of the Commission Regulation Governing Attribution of Broadcast and Cable MDS Interests*, 16 FCC Rcd 1097, 1112 (2001).

¹¹ 25 FCC Rcd 1322 (2010).

inconsistent” with the obligation of a licensee to retain control over its own programming, but does not point to any evidence that the term of the agreement at issue here would be perpetual. SBS objects to the fact that the Terms Sheet lacks a specific provision stating that UVM shall at all times retain control over its programming and seems to argue that this indicates UVM has ceded control of its programming to the Azteca Parties.

SBS also points to Banco Azteca’s right to appoint either an observer or a board member to the licensees’ boards as evidence of the Azteca Parties’ control of the licensees. SBS argues that lenders normally do not appoint board representatives in order to avoid liabilities for the actions of such boards and that by appointing a representative the Azteca Parties will be in a position to exert undue influence over the programming, personnel and financial affairs of UVM. SBS finally objects to the warrants that the Term Sheet proposes to give to Banco Azteca. Although SBS concedes that warrants are not normally attributable until converted into stock, it argues that the warrants related to the Houston station allow it to exert negative control in that context, but it does not indicate how this would be effected.

Discussion. The Commission applies a two-step analysis to a petition to deny under the public interest standard. The Commission must first determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.¹² The first step “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 fact-finder conclude that the ultimate fact in dispute had been established.”¹³ If the petition meets this first step, the Commission must determine whether “on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,” the petitioner has raised a substantial and material question of fact as to whether the application would serve the public interest.¹⁴

In the proceeding at issue here, we must analyze the combined relationships between the Azteca Parties and UVM, as lender/programmer and as proposed borrower/licensee, respectively, to determine whether, as alleged by SBS, they violate the foreign ownership restrictions of the Communications Act either because the Azteca Parties exercise *de facto* control over UVM or because the Azteca Parties’ interests, when properly characterized, constitute equity interests exceeding the threshold prescribed in Sections 310(b)(4) even if they do not convey control. Section 310(b)(4) of the Communications Act prohibits granting a broadcast license to:

[A]ny corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by any foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the revocation or refusal of such license.¹⁵

As SBS correctly notes in its discussion of *Fox II*, we do not look simply at the labels the parties affix to the interests in a transaction, but the underlying relationships in a transaction to determine whether an

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

¹³ *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (“*Gencom*”).

¹⁴ *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e).

¹⁵ 47 U.S.C. §310(b)(4).

alien entity holds interests in a broadcast licensee in violation of the statute.¹⁶ Depending on the surrounding circumstances, the fact that a foreign entity does not officially have an equity interest in a licensee is not enough, by itself, to preclude an investigation into allegations of impermissible alien ownership or control.¹⁷ In this particular case, the same alien entity is providing 97% of the financing for the stations' acquisition and will act as the major program supplier to the stations. Based on these facts, and in light of the seriousness with which the Commission treats questions of alien ownership of broadcast licensees, we believe there are sufficient grounds to proceed to the second step of the petition to deny analysis.

Turning to the second part of our analysis, we conclude that SBS has not raised a substantial and material question of fact as to whether grant of the subject applications would serve the public interest. As noted above, we are examining the relationships between the Azteca Parties and UVM as those between lender/borrower and programmer/licensee as well as looking at the combined relationships. In doing so, we look at the actions of the parties during the bankruptcy auction, the financial arrangements between them, and the proposed programming arrangements between them. Despite SBS's contentions, neither the conduct of UVM or Banco Azteca during the bankruptcy auction nor the financial arrangement between them, severally or collectively, demonstrate that Banco Azteca exercises *de facto* control of UVM or that it holds an ownership interest in UVM in excess of the benchmark standard in Section 310(b)(4). In evaluating whether a party exercises *de facto* control, the Commission will look at which party controls the station's finances, programming, and personnel.¹⁸ As explained below, the record indicates that UVM acted independently during the bankruptcy auction and there is no reason to believe it will not continue to do so in the future. The record also indicates that it will maintain a network affiliate relationship with Azteca that is in compliance with the Commission's Rules and program at least half the time on its stations. There is nothing to indicate that UVM will not maintain control over its own personnel.

There is no prohibition on relying on debt financing for all or part of a station acquisition and there is no prohibition on that financing being provided from a non-U.S. bank. There is nothing unreasonable about a party needing to confer with a lender in an auction situation if the bids in the auction exceed the credit limit previously approved by the lender. Furthermore, in light of the presence of Mr. Breidspecher, the Chief Operating Officer of Azteca America, at the auction, the international phone calls by UVM provide little or no support to SBS' arguments. The conduct of UVM and the Azteca Parties does not indicate anything other than a responsible buyer keeping its banker informed and obtaining continued assurances of financing before continuing its bidding.

In regard to SBS' arguments regarding the network affiliation agreements between UVM and AIC, these appear to be without merit. As discussed above, Azteca America will be supplying approximately half of the station's programming. The rest will be supplied either by UVM or another program supplier hired by UVM. Local advertising time will be sold by UVM. Although all network affiliation agreements must be filed with the Commission and remain subject to our review,¹⁹ there is nothing in the record other than speculation to indicate that the programming relationship proposed here would violate our Rules.

¹⁶ *Fox II*, 11 FCC Rcd at 5719.

¹⁷ *Id.*

¹⁸ See, e.g. *Stereo Broadcasters, Inc.*, 55 FCC 2d 819 (1975) modified, 59 FCC 2d 1002; *Hicks Broadcasting of Indiana, LLC*, 13 FCC Rcd 10662, 10667 (1998).

¹⁹ 47 C.F.R. § 73.3613.

Also, there is nothing in the record to indicate that the Azteca Parties would be involved in any personnel decisions related to either of the stations. Therefore, the record does not support SBS' allegations that any party other than UVM will exercise *de facto* control over the stations' finances, programming, and personnel and there is nothing, therefore, to justify a finding of *de facto* control by the Azteca Parties.

Utilizing the factors laid out in *Fox II*, we find that there is no basis for considering Banco Azteca's debt relationship with UVM the equivalent of an equity interest in UVM. The *Fox II* decision was a two-part analysis. The Commission first considered five criteria to determine whether debt should be considered as equity. Those criteria are: (1) whether there is a written unconditional promise to repay the money on demand and to pay a fixed rate of interest; (2) whether there is subordination to or preference over any indebtedness of the company; (3) the company's debt-equity ratio; (4) whether the alleged debt is convertible to stock; and (5) the relationship between the holdings of stock in the corporation and holdings of the interest in question.²⁰ If the Commission determines that the debt at issue should be treated as equity, it then examines whether the proposed licensee complies with the limits in Section 310(b).²¹

In regard to the first factor, the Amended Commitment Letter indicates that the loans will be payable in full on the seventh anniversary of the closing date and sets a fixed rate of interest. As to the second factor, UVM points out in its opposition, the bank is also treated as a first-lien, secured lender. Those factors favor a finding that the UVM debt is *bona fide*. Turning to the third factor, while the company's debt-equity ratio is not specifically revealed in the record,²² there is no evidence that circumstances similar to those in *Fox II*, where existing stock interests were converted to "debt" and an extraordinary debt-equity ratio prevailed, exist in this case.²³

In regard to the fourth factor, the alleged debt is not convertible to stock, but the lender is being granted warrants in connection with its loan. There is no *per se* prohibition on the grant of such warrants and the warrants in the case of the Dallas station would only give Banco Azteca a 25% interest in the station, which, even if exercised, would comply with Section 310. In the case of the Houston station, the warrants are for up to a 50% interest in the station which, if exercised, could result in negative control of the station. However, because the Azteca Parties are not U.S. entities, those warrants can only be exercised to the extent they comply with Section 310. In addition, the Commission does not ordinarily consider warrants attributable until after they are exercised.²⁴ Because the Azteca Parties can only acquire an interest in these stations that is consistent with the benchmark in Section 310(b)(4), due to the terms of the warrants themselves or by the operation of Section 310, we find no basis in the record for treating these warrants as anything but a non-attributable potential future interest. Accordingly, the fourth *Fox II* factor also favors a finding that the UVM debt is *bona fide*. The final criterion, the relationship between the holdings of stock in the corporation and the holdings of the interest in question does not strictly apply in this case because the Azteca Parties do not as of yet hold stock in UVM or the licensee subsidiaries.

²⁰ *Fox II*, FCC Rcd at 5720.

²¹ *Id* at 5721.

²² The Commission has not required all five factors to be present in making its determination under the five *Fox II* factors. See *Stratos Global Corp.*, 22 FCC Rcd 21328, 21362 (2007).

²³ See *Fox II*, 11 FCC Rcd at 5721 (where debt/equity ratio was roughly 1400 to one, reasoning that "it seems clear that debt repayment will actually depend on the ultimate success of the venture, a hallmark of risk capital").

²⁴ *Review of the Commission Regulation Governing Attribution of Broadcast and Cable MDS Interests*, 16 FCC Rcd 1097, 1112 (2001).

Moreover, the circumstances here bear no resemblance to those in *Fox II*, where the Commission found that the fifth factor favored a finding that the debt was not *bona fide* because “[a]fter recapitalization, News Corp.'s equity capital contribution to THC was reduced to \$24,000, for which it is entitled to 24 percent of the corporate vote and virtually all of the profits and residual interest in an enterprise worth more than a billion dollars.”²⁵ We also do not believe a substantial and material issue of fact is raised by Banco Azteca’s right to appoint either an observer or a board member to the board of directors of either the licensees or their parent companies. Such representation could cause a lender to have an attributable interest in a station, but the existence of such an interest does not violate Section 310(b) nor does it warrant a finding of *de facto* control. The Amended Commitment Letter specifies that, if a director is appointed, that director would be only one member of a five member board and there is no evidence to suggest super-majority or unanimous vote requirements for corporate action. We conclude that using the criteria laid out in *Fox II* there is no basis for treating the debt interest as the functional equivalent of equity and, therefore, no consequent violation of Section 310(b).²⁶ Nor, given this conclusion and our treatment of the other alleged indicia of influence raised by SBS, is there any basis to find that the Azteca Parties exercise *de facto* control of UVM.

The Azteca Parties have voluntarily chosen to enter into both lender/borrower and programmer/licensee relationships with UVM. The parties also voluntarily chose to make the possibility of an alien entity becoming a future shareholder in a U.S. broadcaster part of the transaction. Each of the relationships at issue carries with it particular responsibilities to preserve licensee independence and ensure compliance with Section 310 of the Communications Act. It is also incumbent on the parties to be mindful that their combined relationships cannot become blurred in such a way as to create a violation of either the foreign ownership rules or the basic rules concerning a licensee retaining control over its own station. Based on the record presented in this proceeding, it appears that the parties have acted in such a way as to keep their various relationships distinct and it would be speculative at this time to find that they do not intend to do so in the future. Therefore, we will deny the petition and approve the applications.

We have reviewed the applications, the petition to deny, and the associated pleadings. We conclude that the petitioner has failed to raise a relevant, substantial, and material question of fact as to whether grant of applications would serve the public interest. We further conclude that the assignee is fully qualified to hold the licenses and that grant of the applications will serve the public interest, convenience and necessity.

ACCORDINGLY, IT IS ORDERED THAT, The applications for the assignment of license of television station KNWS-TV, Katy, Texas, from Johnson Broadcasting, Inc., Debtor-in-Possession, to Una Vez Mas Texas Holdings LLC, File No. BALCT-20091229ACT, and for the assignment of license of television

²⁵ *Fox II*, 11 FCC Rcd at 5721.

²⁶ Contrary to SBS’ assertion, we do not find that *Fox II* requires us to depart from our usual practice and require that the parties produce all of the financing documents related to the transaction. Nothing in this decision should be interpreted to mean that we do not reserve the right to require parties to produce any and all documents related to the financing of a particular transaction when we deem such documents relevant to our review.

station KLDT(DT), Lake Dallas, Texas, File No. BALCT-20091229ACZ , from Johnson Broadcasting of Dallas, Inc., Debtor-in-Possession, to Una Vez Mas Texas Holdings LLC, ARE GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau