



Federal Communications Commission
Washington, D.C. 20554

DA 10-495
Released: March 26, 2010

SagamoreHill of Corpus Christi Licenses, LLC
c/o Todd Stansbury, Esq.
Wiley Rein, LLP
1776 K Street, N.W.
Washington, DC 20006

Eagle Creek Broadcasting of Corpus Christi, LLC
c/o Dennis Corbett, Esq.
Lerman Senter PLLC
2000 K Street, N.W., Suite 600
Washington, DC 20006

Channel 3 of Corpus Christi, Inc.
c/o Robert B. Jacobi, Esq.
Cohn and Marks LLP
1920 N Street, N.W., Suite 300
Washington, DC 20036-1622

Re: Application for Assignment of License
KZTV(TV), Corpus Christi, Texas
Fac. ID No. 33079
File No. BALCT-20080730AKQ

Gentlemen:

This is in regard to the above-referenced application to assign the license of station KZTV(TV), Corpus Christi, Texas, from Eagle Creek Broadcasting of Corpus Christi, LLC ("Eagle Creek") to SagamoreHill of Corpus Christi Licenses, LLC ("SagamoreHill"). A Petition to Deny was filed by Channel 3 of Corpus Christi, Inc. ("Channel 3"), licensee of station KIII(TV), Corpus Christi, Texas. On August 24, 2009, the parties amended the applications, and submitted executed versions of certain cooperative agreements between Eagle Creek and a subsidiary of the Evening Post Publishing Company ("Evening Post"), which controls the licensee of station KRIS-TV, Corpus Christi, Texas.¹ Station KRIS-TV and station KZTV(TV)

¹ On September 11, 2009, Eagle Creek filed an FCC Form 316 application creating ECB Licenses, Inc. ("ECB") as a new wholly owned subsidiary. See File No. BALCDT-20090908ADM. The above-captioned application has been

are located in the same Corpus Christi Nielsen Designated Market Area (“DMA”), which contains five independently owned and operating commercial and non-commercial television stations. On October 7, 2009, Channel 3 filed a supplement to its Petition to Deny challenging the executed cooperative agreements and the amendment to the above-captioned application. Channel 3 also filed a Complaint requesting imposition of unspecified sanctions and issuance of an order unwinding the executed agreements between Eagle Creek and Evening Post. SagamoreHill and Evening Post have filed a responsive opposition to the October 7, 2009, supplement, to which Channel 3 has filed reply. For the reasons set forth below, we deny the petition and Complaint, and grant the application.²

Background. As initially proposed, Eagle Creek would enter into an asset purchase agreement with SagamoreHill, pursuant to which SagamoreHill would acquire the station’s licenses, network affiliation agreement, syndicated programming contracts, certain studio equipment, transmission equipment and certain other unspecified property, and a lease for tower and transmitter space, for \$5 million. Concurrent with the SagamoreHill asset purchase agreement, Eagle Creek entered into an asset purchase agreement with Evening Post, pursuant to which Evening Post would acquire station KZTV(TV)’s real property, production and other equipment, and other assets of the station, for \$14,780,00.00. In the August 24, 2009, amendment, the SagamoreHill asset purchase agreement was revised, and the purchase price for the programming assets was reduced to \$1.75 million. Certain changes were also made to the Evening Post asset purchase agreement, and Eagle Creek notified the Commission that the Evening Post asset purchase agreement had been consummated.

Attached to the original applications were unexecuted versions of the following agreements between Evening Post and SagamoreHill: Shared Services Agreement (“SSA”); Agreement for Sale of Commercial Time (“JSA”); Option Agreement (“Option”), and Transmitter Equipment, Studio and Office Lease Agreement (“Lease Agreement”). The parties also stated that they anticipated Evening Post would guarantee a loan to SagamoreHill. Pursuant to the August amendment, Eagle Creek was substituted for SagamoreHill and provisions were added that permitted the assignment of the agreements to SagamoreHill upon grant of the above-captioned application and consummation of the transaction. The amended SSA, JSA, and Lease agreements were consummated and are currently in force. In a subsequent pleading, Eagle Creek provided a hard copy of an agreement whereby Evening Post would guarantee a bank loan from the Bank of South Carolina.

Pursuant to the SSA, Evening Post provides, in addition to back-office support, newscasts not to exceed 15% of station KZTV(TV)’s weekly programming.³ In exchange for the services provided under the SSA, Eagle Creek pays a Monthly Services Fee of \$100,000, plus certain

amended to reflect ECB as the proposed assignor. In addition, the amended agreements name KVOA Communications, Inc. (“KVOA”), the licensee of station KRIS-TV and a subsidiary of Evening Post, as a party. For ease of reference, we will refer to Eagle Creek and Evening Post as being the sole parties to the various agreements discussed herein.

² In addition to the supplement and the Complaint, Channel 3 filed an Informal Objection opposing the above-referenced FCC Form 316 application, in which it raised similar issues as the petition, supplement, and complaint. Eagle Creek filed an Opposition to the Informal Objection.

³ Shared Services Agreement, Section 4(f).

adjustments to account for services provided outside the ordinary course of business or equipment procured on behalf of Eagle Creek.⁴ Under the JSA, Evening Post sells all of the available commercial time for station KZTV(TV), as well as sets advertising rates, subject to the ultimate control of Eagle Creek.⁵ In exchange for its sales representation, Evening Post will retain the lesser of the revenues it collects minus a set Base Rate, or 30% of all revenues.⁶ Pursuant to the Lease Agreement, as amended, Eagle Creek will lease studio and office space from Evening Post for \$16,666.67 per month, and Eagle Creek will retain a right of access to Evening Post's transmission equipment. Each of the agreements has a ten-year term, terminable by each party after the initial ten-year period.

In its original Petition to Deny, Channel 3 argued that the transaction and associated agreements would result in Evening Post either holding *de facto* control over, or an attributable interest in, station KZTV(TV). In support of these allegations, Channel 3 largely relied on differing language contained in the original SagamoreHill and Evening Post asset purchase agreements, stating that “[a] careful review of the two Asset Purchase Agreements establishes that [Evening Post] controls the finances, the real and personal property, the day-to-day operation, indeed, all aspects of KZTV operation,”⁷ in violation of both Section 310(d) of the Communications Act of 1934 (the “Act”) and the local television ownership rule.⁸ Channel 3 further maintained that, when considered together, the SSA, JSA, Option and Lease Agreement would result in Evening Post holding a level of control over the programming of station KZTV(TV) to justify attribution for purposes of determining compliance with the local television ownership rule. Channel 3 also maintained that the transaction would adversely affect competition in the Corpus Christi DMA since it would result in Evening Post controlling more than 50% of the television advertising revenue in the market. Finally, Channel 3 argued that certain schedules and exhibits, which included a list of programming agreements and specified equipment to be purchased by SagamoreHill, were improperly omitted from the asset purchase agreements attached to the application.

SagamoreHill and Evening Post responded in their consolidated opposition that the agreements between and among SagamoreHill, Evening Post, and Eagle Creek are fully consistent with other arrangements approved in the past. They maintained that none of the agreements “in any way diminishes SagamoreHill’s operational control over [station KZTV(TV)].”⁹ They argued that the different language contained in the Eagle Creek/SagamoreHill and Eagle Creek/Evening Post asset purchase agreements is irrelevant in determining how control over station KZTV(TV) would be exercised after the transaction. With respect to the competitive effect of the acquisition, SagamoreHill and Evening Post argued that Channel 3 had provided no reason why the Commission should ignore its ownership rules and

⁴ *Id.* at Section 4(g).

⁵ Agreement for Sale of Commercial Time, Section 2.

⁶ *Id.* at Section 3.

⁷ Petition to Deny, at 10.

⁸ 47 U.S.C. § 310(d); 47 C.F.R. §73.3555(b)(2002).

⁹ Opposition to Petition to Deny, at 2-3.

apply a “vague economic ‘analysis’” to this transaction.¹⁰ In any case, they argued that Channel 3’s claim regarding competition in the market ignores competition from cable systems, radio stations, newspapers and other outlets, as well as ignores the 40% revenue share currently held by Channel 3’s own station, KIII(TV), in the market.¹¹

In reply, Channel 3 reiterated that the differences in language between the two asset purchase agreements indicated “that programming (other than CBS network programming), financial information, matters relating to adverse changes, the sufficiency of Seller’s assets necessary to operate the station and trade agreements... are exclusively within the control of Evening Post.”¹² Channel 3 also stated that the JSA differs from those previously approved in that Evening Post will sell all of the commercial advertising, as well as set advertising rates. Channel 3 further stated that the SagamoreHill’s portion of the purchase price will be guaranteed by Evening Post.

Channel 3’s supplement reiterates many of the same arguments made above. Channel 3 further states that execution of the amended cooperative agreements absent FCC approval is further evidence that the Evening Post has already acquired control over station KZTV(TV). Channel 3 also cites the deletion of the termination dates on both asset purchase agreements, and the redaction of the sales price from the amended Evening Post asset purchase agreement, as further evidence that Eagle Creek has abdicated control. The Complaint reiterates these arguments, and requests enforcement action, including preliminary relief.

In response, SagamoreHill states that pending approval of the assignment applications, Eagle Creek has “retained the FCC licenses, equipment, and programming contracts necessary to operate the station,” has its own employees, and has both “the contractual right and economic incentive to control KZTV(TV)’s programming.”¹³ SagamoreHill maintains that the agreements do not result in either attribution or a transfer of *de facto* control and, thus, the parties were within their rights to enter into such agreements without Commission approval.

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.¹⁴ This 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 factfinder conclude that the ultimate fact in dispute had been established.”¹⁵ If a 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

¹⁰ *Id.* at 4-5.

¹¹ *Id.* at 5.

¹² Reply, at 4 (emphasis in original).

¹³ Opposition to Unauthorized Supplement to Petition to Deny, at 2-3.

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

¹⁵ *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (“*Gencom*”). See also *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (affirming two-step public interest analysis) (“*Serafyn*”).

officially notice,” the petitioner has raised a substantial and material question of fact as to whether granting the application would serve the public interest.¹⁶ We conclude that Channel 3 has failed to raise a substantial and material question of fact as to whether Evening Post holds either *de facto* control over, or an attributable interest in, station KZTV(TV).

In its Complaint, Channel 3 has not requested specific sanctions for the alleged unauthorized transfer of control and violation of the Commission’s ownership rules, other than an order mandating an “unwinding” of the executed agreements. To the extent the Complaint requests that the Commission “unwind” the agreements, we will treat the Complaint as a request for Commission action pursuant to Section 1.41 of the Commission's rules.¹⁷

The Commission analyzes *de facto* control issues on a case-by-case basis.¹⁸ In determining *de facto* control, the Commission examines the policies governing station programming, personnel, and finances.¹⁹ The agreements make clear that Eagle Creek has ultimate control over all programming decisions and policies, which will be retained by SangamoreHill once the transaction is consummated and the various agreements are assigned. With respect to personnel, station KZTV(TV) retains its own management. The SSA states specifically that Eagle Creek will maintain separate personnel for the selection and procurement of programming to be aired on station KZTV(TV), and that there will be no sharing of services, personnel, or information regarding programming with the exception of the newsfeeds to be provided by Evening Post. The newscasts provided by Evening Post are subject to the specific direction and control of Eagle Creek.

We do not find that the structure of the sale indicates that Evening Post will acquire *de facto* control. The Commission has approved sales where certain physical assets would be sold to a buyer other than the proposed assignee.²⁰ The asset purchase agreements govern the details of the sale, and operation of the station until consummation of the proposed transaction. The asset purchase agreements, moreover, are between the seller and the purchaser of the various assets.²¹ As noted by SagamoreHill and Evening Post, their relationship will be governed primarily by the post-consummation SSA and JSA, and to a lesser extent the Option and Lease Agreement. We, therefore, find that removing the termination date from the asset purchase agreements and redacting the sales price from the amended Eagle Creek/Evening Post agreement

¹⁶ *Astroline*, 857 F.2d at 1561; 47 U.S.C. §309(e). *See also Gencom, Inc.*, 832 F.2d at 181.

¹⁷ 47 C.F.R. §1.41.

¹⁸ *See Shareholders of Hispanic Broadcasting Corporation*, 18 FCC Rcd 18834, 18843 (2003); *Chase Broadcasting, Inc.*, 5 FCC Rcd 1642, 1643 (1990).

¹⁹ *See WHDH, Inc.*, 17 F.C.C.2d 856, 863 (1969), *aff'd sub nom., Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

²⁰ *See Piedmont Television of Springfield License LLC*, Memorandum Opinion and Order, 22 FCC Rcd 13910 (Vid. Div. 2007).

²¹ We find that the submission of the schedules is not necessary in order to consider Channel 3’s allegations as an adequate description of the assets was contained in the respective SagamoreHill and Evening Post agreements. *Application of LUJ, Inc. and Long Nine, Inc.*, Memorandum Opinion and Order, 17 FCC RCD 16980 (2002) (omission of certain exhibits to asset purchase agreement appropriate where not germane to consideration of assignment and/or transfer of control application).

does not indicate abdication of control on the part of Eagle Creek.

With respect to the cooperative agreements themselves, the Commission's attribution rules seek to identify those interests that confer a degree "of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."²² The interests triggering attribution are defined in Section 73.3555 Note 2 of the Commission's rules and in Commission precedent.²³ We find that the arrangement between Eagle Creek and Evening Post is consistent with those approved in the past.²⁴ The newscasts provided pursuant to the SSA are limited to 15% of weekly programming, and thus do not exceed the attribution benchmark for LMAs established in the *1999 Attribution Order*. The SSA and JSA are both explicit with respect to employee control, stating that Eagle Creek and SangamoreHill as the eventual assignee will maintain independent management for station KZTV(TV) and, with the exception of newscast production, will maintain separate management for the procurement of programming. The payment to SangamoreHill for services provided under both the SSA and JSA is similar to those approved in the past.²⁵ The payment scheme provides Eagle Creek with both the economic incentive and ability to control programming aired over station KZTV(TV). While Evening Post will be able to set advertising rates, Eagle Creek retains the right to reject commercial advertisements offered by Evening Post. We further find that neither Evening Post's guarantee of debt nor the Option results in attribution.²⁶ In concluding that loan guarantees are not attributable, and that options are not attributable until exercised, the Commission indicated that such relationships do not provide the interest holder with the means or incentive to exert influence over the core operations of a licensee.²⁷

²² *1999 Attribution Order*, 14 FCC Rcd at 12559.

²³ 47 C.F.R. §73.3555 Note 2.

²⁴ See *Nexstar Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 3528 (Vid. Div. 2008); *Chelsey Broadcasting Company of Youngstown, LLC*, Memorandum Opinion and Order, 22 FCC Rcd 13905 (Vid. Div. 2007); and *Malara Broadcast Group of Duluth Licensee LLC*, 19 FCC Rcd 24070 (Vid. Div. 2004).

²⁵ See *Malara Broadcast Group of Duluth Licensee LLC*, 19 FCC Rcd at 24071-24073 (Broker collects all revenues under JSA, 30% of which it will retain as payment of its ad rep services, and broker receives \$150,000 monthly as shared services fee).

²⁶ On March 5, 2009, the staff requested that the parties amend the application to include the monetary consideration indicated in Section 2 of the Option submitted with the original application; provide a hard copy of the guarantee, if the guarantee has been reduced to writing; and list the consideration for the guarantee, monetary or otherwise. On March 19, 2009, SangamoreHill filed an amendment in which it stated that the consideration for the Option, while not finalized, will be between \$40,000 and \$60,000. As noted above, a guarantee for a bank loan to Eagle Creek was submitted in a subsequent pleading. SangamoreHill has stated that there was no consideration for the guarantee and that, at the time of the March 5, 2009, letter, the guarantee had not been reduced to writing. The finalized Option, which was submitted as part of the August 24, 2009, amendment, lists a consideration of \$10. The consideration paid for the Option when considered along with the other interests held by Evening Post in SangamoreHill, does not exceed the 33% of total assets necessary for attribution under the EDP standard. *Review of the Commission's Regulations Governing Attribution of Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559, 12579 (1999) ("*1999 Attribution Order*"), recon. granted in part, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097, 1111 (2001) ("*Attribution Reconsideration*") ("in connection with a transfer or assignment application...the applicant must use the sales price of that transfer or assignment as the total asset value.").

²⁷ *Attribution Reconsideration*, 16 FCC Rcd at 1112.

The Commission, in a Notice of Proposed Rulemaking, has tentatively determined that certain television JSAs should be attributable,²⁸ but an order in the proceeding has yet to be issued. We decline to reach a decision here that would anticipate the outcome of the pending rulemaking. Moreover, even were the Commission to conclude in the future that JSAs similar to the one at issue here would be attributable, the Commission would have to determine what, if any, grandfathering relief for existing television JSAs would be appropriate. We, therefore, decline to condition our decision here on the outcome of the pending rulemaking.

The Commission's multiple ownership rules are intended to promote competition, diversity and localism in the mass media, essential goals "in carrying out [the Commission's] statutory mandate of ensuring that broadcast licensees serve the 'public interest, convenience, and necessity.'"²⁹ Even were we to apply a case-by-case approach in this instance, Channel 3 has failed to proffer sufficient economic data to permit meaningful economic analysis or substantiate its claim of competitive harm. Because, based on the record before us, we find that the agreements between Evening Post and Eagle Creek will not result in either an unauthorized transfer of control or an acquisition of an attributable interest, the parties were under no obligation to acquire Commission consent prior to executing the agreements. Thus, we will deny the request to "unwind" the executed agreements.

Regardless, execution of the agreements, absent a finding regarding the attribution and *de facto* control allegations, does not preclude the Commission from reviewing the agreements for consistency with Commission rules and/or precedent and issuing an appropriate enforcement remedy were we to find a rule violation. With respect to the generalized request for interim relief, a moving party must make a strong showing that: 1) irreparable harm would result before a decision on the merits can be rendered; 2) the petitioner is likely to prevail on the merits; 3) injunctive relief will not substantially harm other interested parties; and 4) injunctive relief is in the public interest.³⁰ Channel 3 has argued that "the calculated decision to bypass the FCC in the context of a contested proceeding warrants at the outset urgent preliminary relief," without showing how that relief would be necessary to prevent irreparable harm.³¹ We find this showing to be inadequate.

For the reasons set forth above, **IT IS ORDERED**, That the September 16, 2009, Informal Objection filed by Channel 3 of Corpus Christi, Inc., **IS DENIED**, and the pro forma application to assign the license station KZTV(TV), Corpus Christi, Texas, from Eagle Broadcasting of Corpus Christi, LLC, to ECB Licenses, Inc. (File No. BALCDT-

²⁸ *In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238, 15239, 15244 (2004).

²⁹ *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12907 (1999) (subsequent history omitted). *In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 13620 (2003) ("2002 Biennial Review Order") (subsequent history omitted).

³⁰ *Washington Metropolitan Area Transit Authority, Inc. v. Holiday Tours, Inc.*, 555 F.2d 841 (D.D. Cir. 1977).

³¹ Channel 3 Complaint, at 10.

20090908ADM), **IS GRANTED**. We further find that the parties to the above-caption long-form application are fully qualified and that grant of the application would comply with all Commission rules as well as serve the public interest, convenience and necessity. Accordingly, **IT IS FURTHER ORDERED**, That the Petition to Deny and Complaint filed by Channel 3 of Corpus Christi, Inc., **ARE DENIED**, and the application to assign station KZTV(TV), Corpus Christi, Texas, from ECB Licenses, Inc., to SagamoreHill of Corpus Christi Licenses, LLC (File No. BALCT-20080730AKQ) **IS GRANTED**.

Sincerely,

William T. Lake
Chief, Media Bureau