

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of )
)
ROCKNE EDUCATIONAL TELEVISION, INC., )
Licensee )
) File Nos. 0004268071, 0004268075
)
KRISAR, INC. )
Lessee )
)
)
Applications for Consent to Long-Term De Facto )
Transfer Leases for Educational Broadband )
Service Stations WLX613 and WLX840 )
)
)
ALBION COMMUNITY DEVELOPMENT, )
INC., Licensee )
) File No. 0004268097
)
KRISAR, INC. )
Lessee )
)
)
Application for Consent to Long-Term De Facto )
Transfer Leases for Educational Broadband )
Service Station WLX929 )
)
)
KRISAR, INC. )
Lessee )
) File Nos. 6022EDSL10, 6023EDSL10
)
)
CLEARWIRE SPECTRUM HOLDINGS III, )
LLC, Sublessee )
)
)
Applications for Consent to Long-Term De Facto )
Transfer Subleases for Educational Broadband )
Service Stations WLX613, WLX840, and )
WLX929 )
)
)

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 2011

Released: October 18, 2011

By: Chief, Broadband Division, Wireless Telecommunications Bureau

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a motion for extension of time to file a petition to deny applications for consent to lease and sublease Educational Broadband Service (EBS) spectrum. Treating the untimely petition to deny as an informal objection, we find it to be without merit, and accordingly deny it.

## II. BACKGROUND

2. On June 17, 2010, Rockne Educational Television, Inc. (“Rockne”) and Albion Community Development, Inc. (“Albion”) filed applications for *de facto* transfer of control of the above-captioned leases to Krisar, Inc. (“Krisar”). On June 24, 2010, Krisar filed applications to sublease its licensed capacity to Clearwire Spectrum Holdings III, LLC (“Clearwire”).<sup>1</sup> Those Applications were subsequently amended on July 15, 2010 per staff request for additional ownership information on a properly filed Form 602.<sup>2</sup> In the Applications, as amended, Rockne and Albion seek Commission approval to transfer control of *de facto* transfer spectrum leases relating to EBS licenses in the Syracuse and Rochester, New York areas to Krisar and Krisar seeks approval of subleases of its licenses spectrum in the Syracuse, Rochester, and Utica, New York and Hartford, Connecticut markets to Clearwire. On June 23, 2010, the Wireless Telecommunications Bureau issued a Public Notice seeking comment on the Applications.<sup>3</sup> Accordingly, the deadline for petitions to deny the applications was July 7, 2010.

3. On July 7, 2010, the Benton Foundation (Benton) filed a request for a 14-day extension of time within which to file a petition to deny, on the basis that the applications raised significant issues, and that the review period had included a holiday weekend.<sup>4</sup> Subsequently, on July 21, 2010, Benton filed its Petition to Deny, which makes three allegations.<sup>5</sup> Specifically, Benton alleges that Rockne, Albion and Krisar misrepresented facts or lacked candor in their original applications by failing to disclose George W. Bott as a real party in interest.<sup>6</sup> Benton further asserts that Albion falsely stated that it was qualified under Section 501(c)(3) of the Internal Revenue Code, that Albion did not fully disclose its officers, and that neither Rockne nor Albion is qualified under Section 501(c)(3).<sup>7</sup> Finally, Benton accuses Mr. Bott of self-dealing by having EBS licensees in which he has an interest lease spectrum to a commercial entity that he owns, which in turn leases spectrum to Clearwire.<sup>8</sup> Benton alleges that such behavior is illegitimate and against the public interest.<sup>9</sup>

4. Rockne, Albion, and Krisar argue that the Benton Petition should be dismissed because it is untimely and Benton allegedly lacks standing to file a petition to deny.<sup>10</sup> They provide information from New York state indicating that Rockne and Albion are non-profit corporations.<sup>11</sup> Krisar provides a

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<sup>1</sup> Applications for *De Facto* Transfer of Control of Leases for Rockne Educational Television, Inc. Stations WLX613 and WLX840 and Albion Community Development, Inc. Station WLX929 to Krisar, Inc., File Nos. 0004268071, 0004268075 and 0004268097 (filed Jun. 17, 2010) and Applications for *De Facto* Transfer of Control of Subleases, File Nos. 6022EDSL10 and 6023EDSL10 (filed Jun 24, 2010) (Applications).

<sup>2</sup> Amendments to Applications (filed Jul. 15, 2010).

<sup>3</sup> Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, and *De Facto* Transfer Lease Applications, and Designated Entity Reportable Eligibility Event Applications Accepted for Filing, Report No. 5989, *Public Notice* (WTB rel. Jun. 23, 2010) at 3.

<sup>4</sup> Motion for Extension of Time within Which to File Petition to Deny, Benton Foundation (filed Jul. 7, 2010) (Extension Request) at 1-3.

<sup>5</sup> See Petition to Deny, Benton Foundation (filed Jul. 21, 2010) (Benton Petition) at 5-6.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 6-7.

<sup>8</sup> *Id.* at 7-8.

<sup>9</sup> *Id.* at 7.

<sup>10</sup> Opposition to Petition to Deny, Krisar, Inc., Rockne Educational Television, Inc., and Albion Community Development, Inc. (filed Aug. 2, 2010) (Opposition) at 1-3.

<sup>11</sup> *Id.* at Attachment 1.

declaration from the employee who prepared Albion's Form 602 stating that she made an inadvertent error when she described Albion as a 501(c)(3) entity.<sup>12</sup> With respect to the self-dealing allegations, Rockne, Albion, and Krisar state that "the underlying lease agreement with Krisar and the sublease agreements with Clearwire have identical financial terms, and all of the money due and owing the not-for-profit licensees is paid to the licensees" (although Krisar is paid a fee by Rockne and Albion for services provided).<sup>13</sup> Rockne, Albion, and Krisar argue that the proposed leases are in the public interest because they will facilitate providing 4G services to educators and consumers.<sup>14</sup>

5. In response, Benton reiterates its arguments regarding real party in interest status, 501(c) (3) status, and self dealing.<sup>15</sup> With respect to its standing to file the Petition, Benton argues:

Benton has a longstanding interest in insuring that spectrum is used for educational purposes, and would be injured if undisclosed for-profit entities are allowed to profit from EBS subleases at the expense of the licensees. It bears emphasis that Benton has not, and does not need to, allege that it has Article III standing. Standing to appear before the Commission is based on the purposes of the Communications Act, and imposes a much lesser burden on a petitioner.<sup>16</sup>

Benton also advocates that the Commission obtain the leases and sublease agreements to determine why Albion and Rockne are subleasing to Krisar.<sup>17</sup> Benton further argues that the timing of the sublease applications shows that Mr. Bott was dealing with Clearwire during or prior to the pendency of the request for approval of the leases from Rockne and Albion.<sup>18</sup>

### III. DISCUSSION

6. *Motion for Extension of Time to File Petition to Deny.* As an initial matter, we find that Benton has not justified a waiver of Section 1.9030(e)(1)(iii) of the Commission's Rules to permit it to file a petition to deny more than fourteen days after the lease applications were placed on public notice accepting it for filing. Specifically, Benton has not demonstrated that: (i) the underlying purpose of the rules(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>19</sup> Benton claims that additional time is warranted because it had a short time period to review the applications (including a holiday weekend) and because of the importance of the issues it raises.<sup>20</sup> Review of the Petition, however, indicates that by exercising reasonable diligence, Benton could have filed its Petition within the normal time period established by the rule. Benton's Petition relies on information readily available in

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<sup>12</sup> Opposition, Affidavit of Doreen Wilson.

<sup>13</sup> *Id.* at 5 and n.13.

<sup>14</sup> *Id.* at 4-5.

<sup>15</sup> *Id.* at 2-3.

<sup>16</sup> Reply to Opposition to Petition to Deny, Benton Foundation (filed Aug. 9, 2010) (Benton Reply) at 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 2.

<sup>19</sup> 47 C.F.R. § 1.925(b)(3). See *Wireless Telecommunications, Inc., Memorandum Opinion and Order*, 24 FCC Rcd 3162, 3166 ¶ 10 (WTB 2009).

<sup>20</sup> Extension Request at 1-2.

the applications, the Commission's records, and the Internet.<sup>21</sup> Furthermore, none of Benton's arguments is particularly complicated. Under these circumstances, we believe that granting the Extension Request would be inconsistent with the Commission's judgment that fourteen days is normally a sufficient period of time for filing petitions to deny.<sup>22</sup>

7. We also find that Benton lacks standing to file a petition to deny in this matter. We disagree with Benton's claim that it need not demonstrate traditional Article III standing. In fact, in the context of wireless applications, the Bureau has used the Article III test to determine whether standing exists.<sup>23</sup> This test requires a complainant to allege "(1) a personal injury-in-fact that is (2) 'fairly traceable' to the defendant's conduct and (3) redressable by the relief requested."<sup>24</sup> We find that Benton's claim of injury "if undisclosed for-profit entities are allowed to profit from EBS subleases at the expense of the licensees" is neither personal nor direct and is therefore insufficient to confer standing. Further, Benton's belief that the proposed transaction would harm Albion and Rockne does not constitute a direct harm to Benton.

8. Accordingly, we deny the Extension Request to the extent it requests leave to file a formal petition to deny. We will, however, treat Benton's pleading as an informal objection under Section 1.41 of the Commission's Rules, and we consider below each of the substantive arguments raised therein.<sup>25</sup>

9. *Real Party in Interest.* Benton claims that on at least six occasions, Krisar failed to identify George W. Bott as the real party in interest to the applications.<sup>26</sup> Benton accuses Krisar of misrepresentation and lack of candor and asserts that Krisar did not amend its application to identify Mr. Bott until Benton filed its Petition.<sup>27</sup> We agree with Benton that Krisar's original ownership disclosure was inadequate and that Krisar should have identified Mr. Bott as the real-party-in-interest. We conclude, however, that there is no evidence of misrepresentation or lack of candor that would call Krisar's character qualifications into question. The *sine qua non* of misrepresentation or lack of candor is intent to

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<sup>21</sup> See Benton Petition at 3-5.

<sup>22</sup> We also note that the Extension Motion did not comply with 47 C.F.R. § 1.46(b), which requires that such motions be filed at least seven days before the filing date, and 47 C.F.R. § 1.46(c), which requires that if a motion for extension of time is filed fewer than 7 days before the filing date, the parties and Commission staff must be orally notified that the motion is being filed.

<sup>23</sup> See *Verde Systems, LLC and Environmental, LLC*, DA 10-1311 (WTB MD rel. Jul. 14, 2010) at n.18; In re 116 Late Filed Applications For Renewal of Educational Broadband Service Stations; Fifty-Four Late-Filed Applications For Extension of Time to Construct Educational Broadband Service Stations, *Memorandum Opinion and Order*, 24 FCC Rcd 8108, 8113-14 ¶ 15 (WTB BD 2009) (citations omitted); *Weblink Wireless, Inc.*, *Memorandum Opinion and Order*, 17 FCC Rcd 24642, 24647 ¶11 (WTB 2002) ("*Weblink Wireless Order*"); see also, *AT&T Wireless PCS, Inc. et al.*, *Order* 15 FCC Rcd 4587, 4588 ¶3 (WTB CWD 2000) ("*AT&T Wireless Order*") (holding that a "petitioner must allege facts sufficient to demonstrate that grant of subject application would cause them to suffer a direct injury.") (citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); Lawrence N. Brandt, *Memorandum Opinion and Order*, 3 FCC Rcd 4082 (1988)). We note that Benton attempts to factually distinguish the *Weblink Wireless Order*. Benton Reply at 2. While we agree that the case is factually distinguishable, it does support the proposition that a direct injury-in-fact is a prerequisite for standing.

<sup>24</sup> See *SunCom Mobile & Data, Inc. v. FCC*, 87 F.3d 1386, 1387-88 (D.C. Cir. 1996) (quoting *Branton v. FCC*, 993 F.2d 906, 908 (D.C. Cir. 1993) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)), *cert. denied*, 511 U.S. 1052 (1994)).

<sup>25</sup> Under 47 C.F.R. § 1.41, we have discretion to consider the Benton Petition as an informal objection. .

<sup>26</sup> See Benton Petition at 5-6.

<sup>27</sup> *Id.* at 6.

deceive the Commission.<sup>28</sup> The Commission has declined to infer intent to deceive the Commission when information is elsewhere disclosed or available in its records.<sup>29</sup> In this case, Krisar's prior ownership filing makes clear that Mr. Bott is the 100 per cent owner of Krisar.<sup>30</sup> Furthermore, Mr. Bott signed the instant applications both as an officer of Albion or Rockne, and as President of Krisar. Under those circumstances, we find no evidence that Rockne, Albion, and Krisar attempted to hide the fact that Mr. Bott had interests in each of these companies. With respect to the timing issue Benton raises, we note that Bureau staff had contacted the parties and requested additional information in the ownership filings before Benton filed.

10. *Not-For Profit/501(c)(3) Status.* Benton also alleges that based upon the absence of its name on Guidestar and IRS 501(c)(3) lists, Albion has misrepresented its status as non-profit entity.<sup>31</sup> Albion admits that the original claim in the Form 602 that it was qualified as a 501(c)(3) entity was incorrect, but provides a declaration stating the description was an error.<sup>32</sup> We find that Albion did not use the requisite level of diligence in completing its Form 602, and we remind Albion of the importance of providing fully accurate information to the Commission at all times. As there is no evidence of misrepresentation or lack of candor, we find that the inaccuracy does not adversely reflect on Albion's or Krisar's character qualifications. Holding 501(c)(3) status is not an eligibility requirement for EBS licenses. Rather, the Commission's rules grant EBS eligibility to "nonprofit organization[s] whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which [are] otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended."<sup>33</sup> As the Commission's EBS rules do not confer any special status on 501(c)(3) entities, Albion and Rockne had no motive to misrepresent 501(c)(3) status to the Commission.<sup>34</sup> We will not infer improper motive from errors, inconsistencies or omissions accompanied by speculation that lacks factual support.<sup>35</sup>

11. *Legitimacy of Transaction.* Finally, Benton argues that the proposed transaction is illegitimate and is contrary to the public interest because the transactions have the appearance of self-dealing which would enable Mr. Bott to make a personal profit.<sup>36</sup> We note that New York state law contains specific restrictions on contracts and transactions between a not-for-profit corporation and its directors or officers.<sup>37</sup> The Commission traditionally "has generally declined to consider issues of a licensee's compliance with the requirements of state corporate law where, as here, no challenge has been made

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<sup>28</sup> See Fox River Broadcasting, Inc., *Memorandum Opinion and Order*, 93 FCC 2d 127, 129 ¶ 6 (1983).

<sup>29</sup> See Joseph W. Bollinger and Donna M. Bollinger, *Memorandum Opinion and Order*, 16 FCC Rcd 18107, 18109 ¶ 5 (2001).

<sup>30</sup> See File No. 0002368587 (filed Nov. 2, 2005).

<sup>31</sup> See Benton Petition at 6-7.

<sup>32</sup> Opposition, Affidavit of Doreen Wilson.

<sup>33</sup> See 47 C.F.R. § 27.1201(a).

<sup>34</sup> We reject as unsupported speculation Benton's claims that Rockne's and Albion's failure to obtain 501(c)(3) status raises additional questions or warrants additional inquiry. See Benton Reply at 3.

<sup>35</sup> See Garrett, Andrews, & Letizia, Inc., *Decision*, 86 FCC 2d 1172, 1180 (Rev. Bd. 1981), *mod. on other grounds*, *Memorandum Opinion and Order*, 88 FCC 2d 620 (1981).

<sup>36</sup> Benton Petition at 7-8; Benton Reply at 3-4.

<sup>37</sup> See McKinney's Consolidated Laws of New York Annotated, Not-For-Profit Corporation Law § 715.

before a state court.”<sup>38</sup> Since the Commission does not specifically regulate in this area, we decline to consider the matter further absent an appropriate state law adjudication. Furthermore, there is no evidence that Rockne, Albion, and Mr. Bott did not comply with the appropriate state law provisions, or that any party associated with the transaction has concerns that the arrangement is unfair. Finally, since Mr. Bott was negotiating on behalf of Rockne and Albion, we disagree with Benton that there is anything improper or suspicious about the timing of the filing of the lease applications and sublease applications.

#### IV. CONCLUSION AND ORDERING CLAUSES

12. We deny Benton’s motion to file an untimely petition to deny for lack of good cause and because Benton lacks standing. We consider its petition as an informal objection. After reviewing the allegations in the Benton Petition, we conclude that no substantial and material question of fact has been raised concerning the character qualifications of Rockne, Albion, or Krisar. We therefore deny the petition and direct processing of the lease applications.

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 309, and Sections 1.41, 1.46, and 1.939 of the Commission’s Rules, 47 C.F.R. §§ 1.41, 1.46, 1.939, that the Motion for Extension of Time Within Which to File Petition to Deny filed by the Benton Foundation on July 7, 2010 IS GRANTED to the extent that the pleading filed by the Benton Foundation on July 21, 2010 will be considered an informal objection and is otherwise DENIED.

14. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 309, and Section 1.41 of the Commission’s Rules, 47 C.F.R. § 1.41, that the Petition to Deny filed by the Benton Foundation on July 21, 2010 IS DENIED.

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 309, and Section 1.9030 of the Commission’s Rules, 47 C.F.R. § 1.9030, that the licensing staff of the Broadband Division, Wireless Telecommunications Bureau SHALL PROCESS the applications for consent to a long-term *de facto* transfer leases and subleases (File Nos. 0004268071, 0004268075, 0004268097, 6022EDSL10 and 6023EDSL10) in accordance with this *Memorandum Opinion and Order* and the Commission’s Rules.

16. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131, 0.331.

#### FEDERAL COMMUNICATIONS COMMISSION

Blaise A. Scinto  
Chief, Broadband Division  
Wireless Telecommunications Bureau

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<sup>38</sup> See David D. Oxenford, Esq., *et al.*, *Letter*, 22 FCC Rcd 5635, 5639 (MB Audio Div. 2007), *citing* Fatima Response, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 18543, 18544 (1999); *see also* North American Broadcasting Co., Inc., *Memorandum Opinion and Order*, 15 FCC 2d 979, 983 (1969) (“With regard to the status of any previous corporate action, the Commission has traditionally declined to interfere in questions of alleged State law violations where no challenge has been made in the State courts and the determination is one that is more appropriately a matter of State resolution.”).