

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)
)
ROY M. SPEER)
(Transferor))
)
and)
)
SILVER MANAGEMENT COMPANY)
(Transferee))
)
For Transfer of Control of)
)
SKIL Broadcasting Partnership,)
Licensee of WEHS-TV, Aurora, IL) File Nos. BTCCT-950913KG
)
SKDA Broadcasting Partnership,)
Licensee of KHSX-TV, Irving, TX) BTCCT-950913KE
)
SKHO Broadcasting Partnership,)
Licensee of KHSH-TV, Alvin, TX) BTCCT-950913KF
)
SKMD Broadcasting Partnership,)
Licensee of WHSW-TV, Baltimore, MD) BTCCT-950913KH
)
SKNJ Broadcasting Partnership,)
Licensee of WHSE-TV, Newark, NJ,) BTCCT-950913KJ
WHSI-TV, Smithtown, NY, and) BTCCT-950913KK
W60AI, New York, NY) BTCTTL-950913KQ
)
SKOH Broadcasting Partnership,)
Licensee of WQHS-TV, Cleveland, OH) BTCCT-950913KL
)
SKLA Broadcasting Partnership,)
Licensee of KHSC-TV, Ontario, CA) BTCCT-950913KM
)
SKVI Broadcasting Partnership,)
Licensee of WHSP-TV, Vineland, NJ) BTCCT-950913KN
)
SKFL Broadcasting Partnership,)
Licensee of WYHS-TV, Hollywood, FL) BTCCT-950913KO
)
SKTA Broadcasting Partnership,)
Licensee of WBHS-TV, Tampa, FL) BTCCT-950913KP
)

Federal Communications Commission

FCC 00-357

SKMA Broadcasting Partnership)	
Licensee of WSHH-TV, Marlborough, MA	)	BTCTT-950913KI
)	
North Central LPTV, Inc.,)	
Licensee of W13BN, Columbus, OH,	)	BTCTT-950913KR
K21OD, St. Louis, MO	)	BTCTT-950913KS
K26CR, Kansas City, MO	)	BTCTT-950913KT
W33AY, Springfield, IL	)	BTCTT-950913KU
W39BH, Champaign, IL	)	BTCTT-950913KV
W64BM, Toledo, OH	)	BTCTT-950913KW
K35CY, Minneapolis, MN	)	BTCTT-950913KX
K41DD, Des Moines, IA	)	BTCTT-950913KY
)	
South Central LPTV, Inc.,)	
Licensee of K15DD, Wichita, KS	)	BTCTT-950913KZ
K14IE, New Orleans, LA	)	BTCTT-950913LA
K67FD, Shreveport, LA	)	BTCTT-950913LB
K39CW, Tulsa, OK	)	BTCTT-950913LC
)	
Southeast LPTV, Inc.,)	
Licensee of W24BF, St. Petersburg, FL	)	BTCTT-950913LD
W24AL, Atlanta, GA	)	BTCTT-950913LE
W56CM, Knoxville, TN	)	BTCTT-950913LF
W36AJ, Jacksonville, FL	)	BTCTT-950913LG
W58CD, Raleigh, NC	)	BTCTT-950913LH
W52BF, Mobile, AL	)	BTCTT-950913LI
W34BI, Birmingham, AL	)	BTCTT-950913LJ
W31BB, Pensacola, FL	)	BTCTT-950913LK
)	
Northeast LPTV, Inc.,)	
Licensee of W17BH, Huntington, WV	)	BTCTT-950913LL
W56CP, Roanoke, VA	)	BTCTT-950913LM
W56CS, Portsmouth, VA	)	BTCTT-950913LN
)	
West LPTV, Inc.,)	
Licensee of K21CX, Tucson, AZ	)	BTCTT-950913LO
K14IF, Spokane, WA	)	BTCTT-950913LP
)	
URBAN TELECOMMUNICATIONS)	
CORP.)	
(Assignor))	
and)	

URBAN BROADCASTING CORPORATION

(Assignee)

For *Pro Forma* Assignment of the Construction Permit for Television Station WTMW(TV), Channel 14, Arlington, Virginia

File No. BAPCT-890418KF

JOVON BROADCASTING CORPORATION

For Petition for Declaratory Ruling Relating to Television Station WJYS-TV, Channel 62, Hammond, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: September 29, 2000

Released: October 6, 2000

By the Commission:

1. Before the Commission for consideration are the following documents filed in response to our decision in *Roy M. Speer*, FCC 99-328 (released Nov. 8, 1999) (*Speer V*): (1) a Petition for Reconsideration in Part (Petition) filed by Silver King Communications, Inc. (Silver King);¹ (2) a response thereto filed by Jovon Broadcasting Corporation (Jovon), the licensee of station WJYS(TV), Channel 62, Hammond, Indiana; and (3) Silver King’s Reply.

BACKGROUND

2. In August 1990, Silver King entered into an agreement to lend Jovon funds to construct and operate station WJYS(TV), and Jovon granted to Silver King an option to acquire a 45 percent nonvoting convertible stock interest in Jovon. Silver King notified Jovon of its election to exercise the option on October 21, 1994, but Jovon refused to consummate the option. On November 7, 1995, Jovon submitted a petition for declaratory ruling, requesting that the Commission declare that this option violates the Commission’s cross-interest policy because Silver King controls station WEHS-TV, Channel 60, Aurora, Illinois, which is located in the same market as station WJYS(TV).

3. In *Roy M. Speer*, 11 FCC Rcd 18393 (1996) (*Speer III*), we noted that the Commission has

¹ Silver King Communications, Inc. is now USA Networks, Inc., and Silver Management Company is now BDTV Inc. For ease of reference in this document, we will refer to these entities by their former names.

not, in the context of the cross-interest policy, permitted a nonattributable equity interest in excess of 33 percent, citing *Cleveland Television Corp.*, 91 FCC 2d 1129, 1133 (Rev. Bd. 1972), *rev. denied*, FCC 83-235 (May 18, 1983), *aff'd* 732 F.2d 962 (D.C. Cir. 1984).² Accordingly, we stated that Silver King may not exercise its option in full, but that it may "exercise the option so that it acquires no more than one-third of the equity of Jovon."³ We also noted that, should our pending review of the Commission's attribution rules and policies in MM Dockets 94-150, 92-51 and 87-154, 11 FCC Rcd 19895 (1996), eliminate the limits placed on common ownership of attributable and non-attributable equity interests in separate facilities serving the same markets, Silver King would be free to exercise its option in full.⁴

4. Upon Jovon's request for clarification of *Speer III*, in *Roy M. Speer*, 13 FCC Rcd 19911 (1998) (*Speer IV*), among other things, we explained our intention, not to reform the Option Agreement to create a 33 percent option or to require Jovon to sell a 33 percent interest to Silver King, but to indicate that our precedent only allows Silver King to take up to a 33 percent interest in Jovon, so long as the Option Agreement, as written, allows it to do so. Moreover, we clarified that, while assuming its validity in reaching our decision, we had ruled only on whether the Option Agreement comported with our regulations and policies. We noted, too, that the Commission generally does not adjudicate disputes related to private contractual matters, and that it was for another forum, such as the courts, to determine the effect, if any, of our decision on the validity of the Option Agreement given its various provisions. Finally, we said that the outcome of the attribution rule making would dictate whether Silver King would be permitted to exercise its option in full under Commission regulations.

5. Silver King sought clarification of *Speer IV*, namely that, assuming the Option Agreement is valid, its proposed use of a trust mechanism to exercise in part its option to acquire a 45 percent nonvoting convertible common stock interest in Jovon comports with the Commission's cross-interest policy and precedent. Silver King first notified the Commission of its trust mechanism proposal in a letter to staff dated June 27, 1997. There, Silver King also advised the Commission of its attempt, in accordance with that proposal, to tender payment and exercise its rights under the Option Agreement in a manner consistent with *Speer III* and the Commission's Rules and policies.⁵ Specifically, Silver King requested that Jovon issue two certificates representing the Class B stock of Jovon subject to the option, one equaling 33.33 percent of the total issued and outstanding stock of Jovon to be issued to a Silver King subsidiary, Silver King Capital Corporation, and the other equaling 11.67 percent of the

² *Speer III*, 11 FCC Rcd at 18443-18444.

³ *Speer III*, 11 FCC Rcd at 18443.

⁴ *Id.*, at 18443, n.26.

⁵ Jovon responded to Silver King's letter, providing its recitation of the facts involved in Silver King's attempt to exercise the option. In turn, Silver King claimed that Jovon did not challenge either the legality or the efficacy of Silver King's proposed trust mechanism. Jovon replied, asserting that, in a letter to Chairman Kennard dated April 20, 1998, it specifically addressed the trust proposal and stated that it was inconsistent with the express terms of the Option Agreement and an inappropriate attempt to evade the Commission's ruling.

total issued and outstanding stock of Jovon to be issued to another Silver King subsidiary, SK Holdings, Inc. (SKH). Upon receipt of the certificate by SKH, Silver King proposed immediately to transfer all of the shares of SKH to a properly insulated trustee, pursuant to a voting trust agreement in a form acceptable to and in compliance with the Commission's attribution rules and guidelines, to hold for the limited benefit of Silver King. To ensure that it would be unable to participate in any increase in value of Jovon, Silver King further stated that the proposed trust agreement would instruct the trustee to seek a buyer for the shares of Jovon stock held in trust at the earliest practicable time, at a price not to exceed the fair market value of the stock as of the date it was placed in the trust. Thus, Silver King maintained, its proposal was structured to ensure that it would have no right to participate in any increase in value of the Jovon shares in excess of 33.33 percent. Because its attempt to exercise its option in this manner was rebuffed by Jovon, Silver King filed a complaint in a Florida state court seeking declaratory relief and specific performance in connection with the Option Agreement. Jovon likewise filed a complaint in the same Florida court, seeking declaratory relief and specific performance to require prepayment of a loan related to the Option Agreement.

6. In support of its proposed use of a trust mechanism, Silver King asserted that the Commission: (1) has previously permitted the use of an insulated trust to facilitate compliance with the cross-interest policy, citing to *Alfredo de Arellano III*, 31 FCC 2d 1117 (1971) (*Alfredo de Arellano*) and *James Hoppers*, 43 FCC 2d 561 (1973) (*Hoppers*); and (2) has repeatedly approved the common ownership of a beneficial economic interest well in excess of 33 percent held in trust and a co-located attributable media interest, without concluding that the cross-interest policy was implicated.⁶ Silver King pointed out, moreover, that it proposed to insulate only those shares of Jovon stock subject to the option that were in excess of a 33 percent interest, namely an equity interest of only 11.67 percent. Further, Silver King stated, it had taken steps to ensure that it would receive no more than what it bargained for, *i.e.*, the current economic value of the Jovon stock subject to the option, in exchange for the financing of the construction and initial operation of Jovon's station. To disallow the use of the proposed trust mechanism as to the shares in excess of 33 percent, Silver King argued, in effect would award Jovon a windfall equal to 11.67 percent of the value of its station, an amount for which it did not bargain and to which it was not entitled under its agreement with Silver King.

7. Jovon responded to Silver King's request, principally arguing that it represented "another thinly disguised effort to have the Commission rewrite the Option Agreement, effectively to allow

⁶ In support of this proposition, Silver King cited to *Twentieth Holdings Corporation*, 4 FCC Rcd 4052 (1989) (*Twentieth Holdings*) and *Wolverine Cablevision, Inc.*, 69 FCC 2d 1487 (1978) (*Wolverine*). While not dispositive, both of these cases involved the use of an insulated trust to achieve compliance with the Commission's multiple ownership rules, not the cross-interest policy. In *Twentieth Century*, which involved the broadcast/newspaper cross-ownership rule, the Commission permitted the common ownership of the *Boston Herald* newspaper and a non-attributable beneficial interest, through an insulated trust, in 100 percent of the stock of the licensee of station WFXT(TV), Boston, Massachusetts. In *Wolverine*, which involved the broadcast/cable cross-ownership rule, the Commission permitted the owner of a television station to hold, through an insulated trust, a non-attributable beneficial interest in 50 percent of the stock of a co-located cable system. Silver King posited that, in each of these cases, the trust beneficiary was permitted to shield the full economic value of its holding from attribution under the cross-interest policy, even though the value of that holding exceeded 33 percent. Request for Clarification, p. 6.

Silver King to exercise the option only up to the 33.33 percent threshold set by the Commission."⁷ According to Jovon, Silver King's proposed trust mechanism was inconsistent with the terms of the Option Agreement, which provides only for an "all or nothing" transfer of 45 percent of Jovon's stock directly to Silver King, and contains no provision to convey either a lesser amount of stock or "part of the stock to Silver King and part to some unidentified trustee, pursuant to a nonexistent trust agreement, for eventual sale at an unspecified time and price to some unknown third party."⁸ For this reason, Jovon stated that it had already terminated the Option Agreement, and litigation to confirm that termination had commenced in Florida state court.

8. In *Speer V*, we noted that, on June 1, 1999, the Florida court granted Jovon's Motion for Summary Judgment, finding that Jovon validly terminated the Option Agreement.⁹ Given that the Option Agreement had been terminated and no longer existed, we found no need to reach the question as to whether Silver King's proposed use of a trust mechanism in this case complies with the Commission's policies and precedent. Accordingly, we dismissed as moot Silver King's Request for Clarification.

9. Here, Silver King again requests a ruling that its proposed structure for exercising the option would not have run afoul of the Commission's former cross-interest policy, reiterating the arguments made below in support of that proposal.¹⁰ Silver King contends that the Commission's failure to so rule in *Speer V* resulted in the Florida court's misinterpretation of the Commission's underlying decisions in this matter and the legality of the Option Agreement, and thus the finding that the Option Agreement had been validly terminated. As a consequence, Silver King maintains that Jovon will benefit from having received a loan from Silver King to construct and operate station WJYS(TV), now worth more than \$87 million, without having to fulfill its express obligations under

⁷ Response of Jovon, p. 2.

⁸ *Id.*

⁹ *USA Networks Inc. v. Jovon Broadcasting Corp.*, Case No. 97-3783-CI-8 and 97-3789-CI-19 (Fla. Cir. Ct. 1999)., Silver King advised the Commission that it had appealed this decision. That appeal is pending in the Florida District Court of Appeals for the Second District.

¹⁰ The Commission eliminated its cross-interest policy when it revised its attribution rules to adopt the equity/debt plus (EDP) attribution rule in MM Dockets 94-150, 92-51 and 87-154, 11 FCC Rcd 19895 (1996). Silver King claims that the Commission's elimination of the cross-interest policy, which had prevented Silver King from exercising the option in full, compounds the fundamental unfairness resulting from the Commission's failure to rule on the proposed trust mechanism. In challenging this claim, Jovon asserts that the Option Agreement would still be unenforceable under the duopoly rule as a result of the change in the attribution rules that was made when the cross-interest policy was eliminated. Silver King responds, contending that Jovon's assertion is patently false because exercise of the option would be permissible under the Commission's Eight Voice/Top Four Ranked Station exception to the duopoly rule, even if it would result in Silver King acquiring an attributable interest in the Jovon television station under the new EDP rule. In this vein, Silver King states that neither its station nor Jovon's station is among the top four ranked station in the relevant Chicago market, and if these two stations were merged, more than eight independent broadcast voices would remain.

the loan arrangement. In addition, Silver King asserts, it will be unfairly deprived of the \$40 million to which it is entitled for making a risky investment almost ten years ago. For these reasons, Silver King argues, “fundamental notions of fairness and basic tenants of administrative law mandate that the Commission act promptly to rectify its failure [to address the proposed use of the trust mechanism at an earlier date] and issue a ruling that USA’s [Silver King’s] proposed structure for exercising the Option complies with the former cross-interest policy.”¹¹ The effect of that decision, Silver King adds, ultimately will be for the Florida courts to determine.

10. Finally, Silver King believes that the Commission erred in *Speer V* by dismissing as moot the question as to whether use of the proposed trust mechanism would comply with the former cross-interest policy. A case is moot, Silver King asserts, if “‘no actual or live controversy exists,’ for example, when [a court] cannot grant effective relief,”¹² and if “‘. . . the personal interest required to initiate the action ceases to exist.’”¹³ Silver King argues that, because it filed a timely appeal of the Florida court’s decision, a controversy continues to exist and the issue regarding the proposed trust mechanism is not moot. Even if the issue had been rendered technically moot, Silver King claims that the Commission still would have had the authority and the obligation, to issue a declaratory ruling pursuant to Section 1.2 of the Commission’s Rules.

11. In response, Jovon contends that Silver King’s Petition is without merit, as it constitutes an attempt “to have the Commission rewrite the Option Agreement between the parties and to encroach upon the authority of the state courts, where this matter belongs.” Jovon also maintains that, contrary to Silver King’s assertion, the Florida court did not misinterpret the Commission’s underlying decisions in this case or the terms of the Option Agreement. Moreover, in reaching its decision, Jovon says that the Florida court had full knowledge of Silver King’s ongoing attempt to obtain a ruling from the Commission on the proposed trust mechanism. In fact, Jovon adds, the Florida court refused to grant Silver King’s requests to stay the lawsuit until Commission ruled on the trust issue. Jovon surmises that the Florida court refused to grant the stay because a decision from the Commission would not have affected the outcome of the lawsuit. For, according to Jovon, regardless of how the Commission might have ruled on Silver King’s proposed trust mechanism, the conveyance of stock to a trust would not be in accordance with the terms of the Option Agreement, which provided for the full conveyance of a 45 percent interest to Silver King or nothing at all, and contained no provision allowing Silver King to take only a 33.33 percent interest. Therefore, Jovon insists, even if the Commission had ruled on Silver King’s proposal, the Florida court still would have determined that, since the Option Agreement could not be exercised in accordance with its terms, Jovon had the right to terminate it. For these reasons, and given the Florida court’s ruling that Jovon legally terminated the Option

¹¹ Petition for Reconsideration in Part, pp.12-13.

¹² *Id.* at p.9. Silver King quotes from *Aluminum Company of America et al. v. Administrator, Bonneville Power Administration*, 175 F. 3d 1156, 1163 (9th Cir. 1999) (quoting *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999).

¹³ *Id.* at p.10, quoting *DiGiorgio v. Lee et al.*, 134 F.3d 971, 973 (9th Cir. 1998).

Agreement, Jovon concludes that there is nothing more for the Commission to do and that Silver King's Petition should be rejected.

12. Silver King replies to Jovon's arguments, maintaining, among other things, that a ruling on the proposed trust mechanism would not require the Commission to interpret, much less rewrite, the Option Agreement. It would merely "provide the Florida appellate court with necessary guidance as it considers [Silver King's] appeal, the result of which may hinge upon whether [Silver King's] attempt to exercise the Option complied with the Commission's former cross-interest policy."¹⁴ Silver King remarks, moreover, that if the Commission's decision on the proposed trust mechanism would have no effect on the outcome of the lawsuit in the Florida courts, than Jovon should have no reason to object to Silver King's request that the Commission rule on this very narrow issue before it.

13. *Discussion.* As acknowledged by Silver King and Jovon, and as previously stated by us in *Speer IV* and *Speer V*, the Commission has long held that it is not the proper forum for the resolution of private contractual disputes and that any redress should be sought in a local court of competent jurisdiction. *See, e.g., Cope Communications, Inc.*, 13 FCC Rcd 14564, 14567 (1998); *see also John F. Runner, Receiver*, 36 RR2d 773, 778 (1976); *Listener's Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987). Indeed, the dispute between Silver King and Jovon concerning the terms and validity of the Option Agreement constitutes a private contractual matter for which both parties have sought resolution in a Florida state court. In this regard, we emphasize that, in the underlying proceedings here, we only assumed the validity of the Option Agreement for the purpose of determining whether it complies with the Commission's Rules and policies. We neither ruled on the validity of the Option Agreement in fact, nor intended to prejudge the outcome of the related litigation in Florida.

14. Likewise, we do not intend to prejudge the outcome of Silver King's pending appeal of the Florida court's decision finding that Jovon validly terminated the Option Agreement. Rather, we simply intend to address the narrow issue before us, Silver King's proposed use of a trust mechanism, leaving the effect of our decision, if any, to be determined by the courts. That being said, we believe that Silver King's proposed use of a trust mechanism to exercise its option comported with the Commission's former cross-interest policy and precedent. We point out, again, that the Commission has revised its attribution and multiple ownership rules, *see supra* n.10, and note that the Commission has not yet addressed the future, similar use of trusts *vis-à-vis* the new attribution and multiple ownership rules.¹⁵ However, in prior decisions under the former multiple ownership rules, the Commission found that trusts legitimately could be used to avoid attribution of broadcast interests.

¹⁴ Reply at p.3.

¹⁵ *See Attribution of Ownership Interests, Report and Order* in MM Docket No. 83-46, 97 FCC 2d 997, 1023-1024 (1984) (subsequent history omitted). Under the Commission's attribution criteria, the ownership interests of beneficiaries will not be attributed to them if they are sufficiently insulated to prevent the exercise of control or influence over the trustee. *Id.*; *see, e.g., Clear Channel Communications*, DA 99-803 (rel. April 29, 1999) and *SFX Broadcasting, Inc.*, 13 FCC Rcd 12366 (MMB 1998) (properly insulated, disposition trusts used to avoid attribution of broadcast interests under the local radio ownership rules); *Twentieth Holdings*, 4 FCC Rcd 4052; *Wolverine Cablevision, Inc.*, 69 FCC 2d 1487.

Accordingly, based on the information before us, we see no reason why Silver King's proposed use of a trust instrument could not have been used in the context of our former cross-interest policy. The Commission previously permitted the use of a voting trust arrangement as a means of assuring compliance with its cross-interest policy, provided that the trust instrument conformed with the Commission's insulation standards. For example, in *Alfredo de Arellano*, the Commission approved the use of a voting trust in order to permit the holder of a 19.9 percent non-attributable equity interest in a television station to acquire a minority equity interest in, and become an officer and director of, a corporation which controlled an AM-FM radio combination located in the same market.¹⁶ Similarly, in *Hoppers*, the Commission allowed the owner of a minority equity interest in one media outlet to place that interest in an irrevocable trust so that he could become a "key employee" of another outlet in the same market, which otherwise would have been prohibited under the cross-interest policy.¹⁷

15. Here, Silver King, which controls a station located in the same market as Jovon's station WJYS(TV), proposes to exercise its option, retaining only the 33 percent non-voting interest permissible under Commission precedent, and to transfer the remaining 11.67 percent to a properly insulated trust for disposition to an unrelated, third party. Assuming that the trust met our insulation standards, we believe Silver King could have used it to exercise its option in a manner that was consistent with the Commission's cross-interest policy and precedent. We note, however, that Silver King never submitted the proposed trust instrument for our review, so we can make no determination as to whether it would have complied with our insulation standards. In this regard, before exercising the option using the trust mechanism, Silver King would have been required to submit the trust instrument for our review and approval. Finally, we emphasize the narrow scope of our determination here, for which purpose we have assumed the existence of a valid Option Agreement, having focused only on whether the exercise of the option, as proposed by Silver King, *would have complied with our rules, policies and precedent, specifically our former cross-interest policy*. Whether Silver King could have done so consistent with the terms of the Option Agreement is, again, a private contractual matter, the resolution of which we leave to the parties themselves and the courts.

CONCLUSION

16. Accordingly IT IS ORDERED That the Petition for Reconsideration in Part filed by Silver King IS GRANTED to the extent indicated herein.

¹⁶ 31 FCC 2d 1117. Cf. *Wood Broadcasting, Inc.*, 36 FCC 2d 138 (1972) (voting trust arrangement found insufficient to assure compliance with cross-interest policy contrasted with the facts of *Alfredo de Arellano*).

¹⁷ 43 FCC 2d 561. See also *Walter B. Dunn*, 29 FCC 2d 327 (1971).

17. IT IS FURTHER ORDERED, THAT the Mass Media Bureau send by Certified Mail - Return Receipt Requested - a copy of this Memorandum Opinion and Order to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary