

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

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| In the matter of |) | |
| |) | |
| USA Broadcasting, Inc. |) | |
| (Transferor) |) | BTCCT-20010123AAL |
| |) | Fac. ID 60556 |
| and |) | BTCCT-20010123AAM |
| |) | Fac. ID 60560 |
| Univision Communications, Inc. |) | BTCCT-20010123AAN |
| (Transferee) |) | Fac. ID 60549 |
| |) | BTCCT-20010123AAO |
| For Consent to Transfer Control of Licenses for |) | Fac. ID 60539 |
| Stations WQHS-TV, Cleveland, OH; WHSP-TV, |) | BTCCT-20010123AAP |
| Vineland, NJ; KHSC-TV, Ontario, CA; WAMI- |) | Fac. ID 60559 |
| TV, Hollywood, FL; WBHS-TV, Tampa Bay, FL; |) | BTCCT-20010123AAQ |
| KSTR-TV, Irving, TX; KHSH-TV, Alvin, TX; |) | Fac. ID 60534 |
| WEHS-TV, Aurora, IL; WHOT-TV, Athens, GA; |) | BTCCT-20010123AAR |
| WHUB-TV, Marlborough, MA; WBSF(TV), |) | Fac. ID 60537 |
| Melbourne, FL; WHSE-TV, Newark, NJ; and |) | BTCCT-20010123AAS |
| WHSI-TV, Smithtown, NY. |) | Fac. ID 60539 |
| |) | BTCCT-20010123AAT |
| |) | Fac. ID 48813 |
| |) | BTCCT-20010123AAU |
| |) | Fac. ID 60551 |
| |) | BTCCT-20010123AAV |
| |) | Fac. ID 5802 |
| |) | BTCCT-20010123AAW |
| |) | Fac. ID 60555 |
| |) | BTCCT-20010123AAX |
| |) | Fac. ID 60553 |

Memorandum Opinion and Order

Adopted: March 1, 2004

Released: March 3, 2004

By the Commission:

1. By this order, the Commission dismisses an application for review filed by Theodore M. White ("White"), requesting review of a May 21, 2001, letter decision by the Chief of the former Mass Media Bureau granting consent to transfer control of the above-captioned 13 licenses from wholly owned subsidiaries of USA Broadcasting, Inc. ("USA Broadcasting") to Univision Communications, Inc. ("Univision"). The Bureau dismissed White's petition to deny the transfer of control applications, but treated the filing as an informal objection and addressed the arguments raised therein.¹

¹ 47 C.F.R. § 73.3587. The Bureau dismissed White's petition to deny because he failed to demonstrate listener or competitor standing, and further failed to sufficiently demonstrate that injury would result from the grant. *See, e.g.*, (continued....)

2. In their separate oppositions to the application for review, both Univision and USA Broadcasting argue that White lacks standing to file the application for review since he is not aggrieved within the meaning of Section 1.115 of the Commission's rules. Subsequent to the letter decision approving the transfers, the Bureau granted consent to assign the license of WTMW(TV) from Urban Broadcasting Corporation ("Urban"), debtor-in-possession, in which White was the sole voting shareholder, to a wholly owned subsidiary of Univision.² White, therefore, has no remaining ownership interest in Urban and, thus, has no standing to file an application for review. Notwithstanding the arguments of USA Broadcasting and Univision, we shall exercise our discretion and consider the arguments raised by White in his filing as an informal objection.³

BACKGROUND

3. At the time of the staff's letter ruling, White was the sole voting shareholder of Urban, the then permittee of WTMW(TV), Arlington, Virginia. USA Broadcasting's relationship with Urban is the result of an assignment of contractual rights. A predecessor-in-interest to USA Broadcasting had loaned funds to Urban for the construction and operation of station WTMW(TV). Simultaneous with the loan agreement, Home Shopping Club, L.P. ("HSC"), an affiliate under common ownership with USA Broadcasting, entered into an agreement with Urban to provide programming for WTMW(TV). The affiliation agreement required HSC to compensate Urban at a fixed rate for each hour the station carried Home Shopping Network programming, expressly conditioned upon WTMW(TV)'s ability to operate at 50% or greater of its full authorized operating power. The payments received by Urban apparently provided the funds for repayment of the loan.

4. Urban applied for and was authorized to operate WTMW(TV) with an effective radiated power ("ERP") of 2880kW. Upon commencement of operations pursuant to program test authority, WTMW(TV) was found to cause interference with certain land mobile operations. Thereupon, Urban, following a request for special temporary operating authority ("STA"), added filters to the WTMW(TV) transmitter that reduced the station's actual operating power to 2541kW.⁴ Because of remaining interference, Urban filed a second STA request resulting in a further reduction in power from Urban's authorized ERP of 2880 kW. HSC contends that this reduction in power relieved it of the obligation to pay under the affiliation agreement as WTMW(TV) was no longer able to operate at 50% of 2880kW. Because Urban no longer had access to the payments under the affiliation agreement needed to make its loan repayments, USA Broadcasting instituted a lawsuit in Arlington County Circuit Court for breach of the loan agreement. At issue in the lawsuit was whether WTMW(TV) was operating at 50% of full operating power as defined in the affiliation agreement and, as a result, whether HSC had to compensate WTMW(TV) for airing Home Shopping Network programming. Urban argued that the affiliation agreement required WTMW(TV) to operate at 50% of 2541kW, the original maximum authorized ERP of 2880kW less the loss in power due to the addition of filters. USA Broadcasting argued that the affiliation

(...continued from previous page)

Chet-5 Broadcasting, L.P., 14 FCC Rcd 13041 (1999); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

² See File No. BAPCT-20010411AAX (granted June 1, 2001)

³ 47 C.F.R. § 73.3587. Exercising discretion in this case is consistent with past proceedings involving Urban. Following a comparative hearing in 1992 granting the construction permit for WTMW(TV) to Urban, Urban challenged the standing of WSCT-TV, Inc., to file an application for review on the basis that it no longer existed as a corporate entity. Though the Commission found that a dissolved corporation could not be aggrieved within the meaning of Section 1.115, it considered the filing as an informal request for Commission action and addressed the arguments raised therein. See *Urban Telecommunications Corp.*, 7 FCC Rcd 3867, 3868 n. 7 (1992). Under these circumstances, exercise of our discretion to consider White's arguments is appropriate.

⁴ The STA request was filed along with Urban's application for license. See BLCT-19930406KF.

agreement contemplated a full operating power of 2880kW, as already determined by a Bankruptcy Court when it approved an Urban-proposed reorganization plan. The Circuit Court judge ruled for USA Broadcasting, and held that the Bankruptcy Court's determination precluded re-litigation of the issue within the context of the contract dispute.

5. In his petition to deny the transfer of control applications, White argued that USA Broadcasting misrepresented WTMW(TV)'s full operating power before the Circuit Court judge. White further argued that USA Broadcasting failed to reform its contractual relationship with Urban as mandated by the Commission in *Roy M. Speer* ("*Speer III*"), 11 FCC Rcd 18393 (1996). In *Speer III*, the Commission held that the contractual relationship between Urban and USA Broadcasting's predecessor-in-interest, Silver King Communications, Inc., resulted in an unauthorized transfer of control of Urban, and a related violation of the then-existing duopoly rule.⁵ To avoid a risk of similar violations in the future, the Commission required that certain provisions in the contractual relationship between Urban and Silver King be reformed.⁶ Negotiations to reform the relevant provisions began soon after the Commission's decision, but apparently were hampered by the breakdown in the business relationship between Urban and Silver King.

6. The Bureau denied White's arguments, noting that the dispute between Urban and USA Broadcasting was a private contractual matter not calling into question USA Broadcasting's compliance with Commission rules, and that the allegations involved the kind of unadjudicated non-FCC misconduct that the Commission has determined not to examine in evaluating the character qualifications of a licensee. With respect to White's contention that USA Broadcasting failed to reform its contract with Urban as mandated by the Commission, the Bureau determined that this fact should not prevent grant of the applications given the intervening changes in the television duopoly rule since *Speer III* and the then-pending application to assign the license of WTMW(TV) from Urban to Univision.

DISCUSSION

7. In the instant application for review, White asserts that the Bureau erred in finding that his allegations involved a private contractual dispute. White contends that he did not "argue the substance of any contract provision" in the petition to deny, "but rather demonstrated that USA Broadcasting had deceived the Circuit Court as to the power that the FCC had granted him."⁷ White further asserts that, even though such wrongdoing is unadjudicated non-FCC misconduct, a hearing should have been designated on issues relating to USA Broadcasting's character qualifications since the alleged misconduct was so "egregious as to shock the conscience and evoke almost universal disapprobation."⁸ Finally, White asserts that the Bureau's decision not to consider the failure to reform the agreement between Urban and USA Broadcasting was erroneous, and the Commission must commence an evidentiary hearing to evaluate USA Broadcasting's conduct in this regard.

8. We affirm the Bureau's letter decision as described in further detail below, dismiss the application for review, and reject White's arguments when considered as an informal objection. The arguments raised in the application for review are essentially reiterations of the arguments raised in the petition to deny, which the Bureau Chief adequately and correctly addressed in his letter decision. We find no reason to disturb that ruling.

⁵ *Speer III*, 11 FCC Rcd at 18428.

⁶ *Id.* at 18430-18434.

⁷ Application for Review, Page 3.

⁸ As support, White cites *Policy Regarding Character Qualifications in Broadcast Licensing* ("*Character Qualifications*"), 102 FCC 2d 1179, 1205 n.60 (1986).

9. The Commission, for good reason, does not assume “jurisdiction in *contractual controversies* involving broadcast licensees, recognizing that such matters are generally private in nature and appropriately left to local courts for resolution.”⁹ The gravamen of the dispute between Urban and USA Broadcasting centered upon whether 2880kW or 2541kW constituted the full operating power of WTMW(TV), as that term was defined by the parties to the affiliation agreement. Since the Commission originally authorized operation at 2880kW, then permitted the addition of filters that resulted in a temporary reduction of power to 2541kW, resolution of the issue is a matter of contract interpretation. As the Bureau correctly pointed out, the Commission has long held that it is not the proper forum to resolve issues of contract interpretation, as long as a licensee’s compliance with Commission rules is not called into question.¹⁰ Here, the dispute does not involve the proper definition or application of the “full operating power” for Commission-related purposes, such as compliance with our rules and conditions. Moreover, the misconduct alleged by White was neither adjudicated, nor did it meet the Commission’s definition of “egregious misconduct” as developed in a long line of cases and, therefore, should not be considered in assessing USA Broadcasting’s character qualifications.¹¹

10. We find that the staff did not have the authority to decide the issue of whether USA Broadcasting had adequately complied with the Commission’s contract reformation order in *Speer III*. This issue should have been referred to the Commission for disposition. Nevertheless, we conclude that the staff’s decision on the merits was correct. The original petition to deny should have been denied because the reformation issue was moot and USA Broadcasting had earlier taken reasonable steps to comply. We agree that the failure to reform the contractual relationship between USA Broadcasting and Urban as mandated in *Speer III* warranted no further consideration within the context of the instant transfer of control. While a complaining party may question a licensee’s conduct and so invite Commission scrutiny, the Commission is given broad discretion to determine whether sanctions or remedies are appropriate.¹² The deteriorating business relationship between USA Broadcasting and Urban posed significant obstacles to reformation of the contract, as evidenced by the several letters submitted by the parties demonstrating that negotiations had been undertaken to reform the various contracts between USA Broadcasting and Urban. The public interest would not have been served by further consideration of this issue given the intervening changes in the duopoly rule since *Speer III*, and the subsequent grant of the application assigning the license of WTMW(TV) to Univision.

11. Accordingly, IT IS ORDERED That pursuant to Section 1.115(g) of the Commission’s rules, 47 C.F.R. §1.115(g), the application for review filed by Theodore M. White on June 20, 2001, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁹ *McCalister Television Enterprises, Inc.*, 60 R.R.2d 1379, 1383-84 (1986).

¹⁰ *Cope Communications, Inc.*, 13 FCC Rcd 14564, 14567 (1998); *Speer III*, 11 FCC Rcd at 18413.

¹¹ *Character Qualifications*, 102 FCC 2d at 1195-1203, 1205 n.60. See, e.g., *Contemporary Media Inc.*, 10 FCC Rcd 13685, 13687 n.9 (1995); *Williamsburg County Broadcasting Corp.*, 5 FCC Rcd 3034, 3035 (1990); and *Dubuque TV Ltd. Partnership*, 3 FCC Rcd 1886, 1886-87 (1988).

¹² *Black Media Works, Inc.*, DA 01-309 (released February 7, 2001); *WOKO, Inc. v. FCC*, 329 U.S. 223 (1946).