

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of

KDAI Licensing, LLC, Assignor)
and)
RBC License LLC, Assignee)

For Consent to the Assignment of)
License of)
KDEY-FM, Ontario, CA)

and)

For Consent to the Assignment of)
License of)
KDAY(FM), Redondo Beach, CA)

To: Office of the Secretary
Attn: Chief, Audio Division

File No. BALH-20130408ACM
Facility ID No. 10099

File No. BALH-20130408ACL
Facility ID No. 10100

FILED/ACCEPTED

JUN 10 2013

Federal Communications Commission
Office of the Secretary

REPLY

Brett Hamilton (“Hamilton”), by his attorney, and pursuant to Section 1.45 of the Commission’s rules, submits his Reply to the May 29, 2013 Opposition (“Opposition”) to the Petitions to Deny filed by RBC License LLC with respect to the assignments of the licenses for KDAY(FM), Redondo Beach, California and KDEY-FM, Ontario, California.¹ In support, Hamilton respectfully submits the following:

The applications in question were filed with the Commission on April 8, 2013. The assignee is RBC License, LLC (“RBC”), a Delaware limited liability company and a wholly owned subsidiary of RBC Communications, a Delaware corporation. RBC Investments, LLC, a

¹ Hamilton is also concurrently filing a Supplement to the KDEY-FM Petition to include Mr. Hamilton’s Declaration which was inadvertently not included with the Petition.

ORIGINAL

Delaware limited liability company holds and has power to vote 80% of the capital stock of RBC Communications, Inc. The sole member of RBC Investments, LLC is Mr. Anthony Yuen, a United States citizen. Phoenix Satellite Television (U.S.), Inc., a Delaware corporation (“Phoenix”) holds and has the power to vote the remaining 20% of the capital stock of RBC Communications, Inc.

Phoenix is wholly-owned by Phoenix Satellite Television Universal Limited, a British Virgin Islands entity which ultimately is wholly-owned by Phoenix Satellite Television Holdings Limited, a Cayman Islands company, the stock of which is publicly traded and listed on the Hong Kong Stock Exchange.

RBC states that Phoenix’s non-United States ownership is in full compliance with the provisions of Section 310 of the Communications Act which limits to 20% the non-United States ownership of the capital stock of an entity which holds a broadcast radio license. *See* 47 U.S.C. § 310(b)(2).

Hamilton in his petitions filed on May 13, 2013 pointed out that in construing Section 310(b)(4), the FCC has held that ownership for purposes of that subsection is not limited to the number of shares of stock held by an entity. The FCC also considers the percentage of equity capital contributed by the foreign entity. Hamilton cited *Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995) (FOX I) where News Corp. provided 99 percent of the capital equity of Twentieth Century Holdings.²

The FCC concluded that, in determining compliance with Section 310(b)(4), such a determination is not only based on voting power, but also includes other indicia of ownership,

² News Corp., an Australian corporation held 24 percent of the voting stock of Twentieth Century Holdings, a U.S. corporation which owned 100 percent of Fox Television Stations, Inc.

such as capital contributed, rights to proceeds, etc. The Commission justified its conclusion based on the language “owned of record or voted by aliens...” in the statute.

In Fox I, the FCC concluded that the corporate structure described above violated Section 310(b) and directed Fox Television Stations -- the licensee of the stations -- to take either of two steps: 1) notify the FCC whether, how, and when it would bring its ownership structure into compliance with the 310(b) benchmark, or 2) submit a showing as to why its existing structure (or another structure which exceeds the benchmark) would serve the public interest. Fox responded to that directive by revising its corporate structure to reduce the foreign entity’s (News Corp.) capital to 24 percent with the remainder converted to debt. In a subsequent decision, Fox Television Stations, Inc., 11 FCC Rcd 5714 (1995) (“Fox II”), the FCC applied an “economic realities” test and concluded that the conversion of News Corp.’s paid-in capital to debt did not change News Corp.’s entitlement to the risks and rewards of ownership of the Fox television stations and therefore concluded that News Corp.’s indirect ownership of the Fox television stations still exceeded the 25 percent benchmark. The FCC reached that conclusion despite acknowledging the following factors:

- (1) the loan was secured by a promissory note bearing a fixed rate of return;
- (2) the note was not convertible to equity and had no liquidation rights.

Notwithstanding those factors which supported a finding that the debt was *bona fide*, the FCC noted the disparity between the paid in capital (\$1,000,000) and the debt (\$1.4 billion) -- a debt/equity ratio of 1,400/1. Since a small amount of equity supported a large amount of debt, the FCC concluded repayment of the debt would depend on the success of the venture, which made it more like risk capital.

Based on the FCC's decisions in Fox I and Fox II, it is clear that the FCC measures foreign ownership of the parent corporation for Section 310(b)(4) purposes based on the amount of equity contributed to the venture as well as the percentage of stock of the licensee's parent corporation, and it would not allow a corporate structure based on the Foreign Entity "lending" funds to the parent corporation if the debt/equity ratio was so disproportionate as to make repayment of the debt dependent on the success of the venture.

As a general matter, foreign entities are permitted to lend money to holders of U.S. broadcast licenses. They may even impose reasonable loan conditions to protect their interests as creditors so long as those conditions do not rise to the level of constituting *de facto* control of the licensee. If the FCC perceives a lender/borrower relationship which results in the lender effectively controlling the license, that relationship will be disallowed. Where the lender is a foreign entity, such evidence of control would be perceived to violate the Section 310(b) foreign ownership limitations. Whether or not a specific loan instrument constitutes impermissible control is evaluated on a case-by-case basis. Clearly, an inquiry by the Commission is warranted so it may fully and properly evaluate the matter at hand.

The Commission has an obligation to assure itself of an applicant's financial obligations before making a grant. *See Rem Malloy Broadcasting*, 75 RR 2d 1405 (1994). Furthermore, in *Citizens for Jazz on WRVR*, 775 F.2d 392, 397 (1985), the D.C. Circuit Court admonished the Commission to look for fire when the matter is enveloped in smoke. It is clear that the Commission cannot bury its head in the sand and fail to make the necessary inquiry. The Commission was also admonished by the D.C. Circuit that it not hold a movant to an unreasonable burden when a legitimate question has been raised, particularly when the potentially explosive facts are within the exclusive control of the party under scrutiny. *See*

Beaumont Branch of the NAACP v. FCC, 854 F.2d 501, 509-10 (D.C. Cir. 1988). *See generally California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679-80 (D.C. Cir. 1985).

RBC's defense, which ignores the case precedent, to the arguments raised by Hamilton is the following:

“Having alleged nothing more than that there is some direct Chinese investment in the assignee, the Petitioner has fallen far short of the requirement that he proffer specific allegations of fact sufficient to make a *prima facie* case that the proposed transaction would result in a violation of a statute or Commission rule.”

RBC also attempts to defend the Chinese ownership issue by representing that on May 24, 2013, the parties filed a preliminary notification with the Committee on Foreign Investment in the United States (“CFIUS”) with respect to the proposed transaction. RBC further states that “counsel to the parties have had discussions with CFIUS representatives regarding the transaction and the parties intend to file a formal notification with CFIUS on or about May 31³, 2013.⁴ *See* Opposition pg. 7.

RBC does not provide a copy of what was submitted for CFIUS review.⁵ RBC also does not offer to provide to the Commission and Hamilton the ultimate CFIUS determination. Furthermore, since the CFIUS review process was voluntarily initiated, the parties must have had concerns. This is further grounds for the Commission to make an inquiry.

It should also be noted that the CFIUS review does not trump the Commission's authority under the mandate of the Communications Act. Nor, for that matter, is it binding on the

³ Since RBC's Opposition was filed on May 29, 2013, RBC is being disingenuous. The Commission is still left in the dark as to whether a “notification” was in fact filed. Furthermore, the Commission and Hamilton are left to guess as to the nature of the discussions which have transpired with the CFIUS representatives.

⁴ The respective Asset Purchase Agreements also references the CFIUS review.

⁵ The CFIUS process is purely voluntary. CFIUS is an inter-agency committee authorized to review transactions that result in control of a U.S. business by a foreign person in order to determine the effect of such transactions in the national security of the United States. CFIUS operates pursuant to Section 721 of the Defense Production Act of 1930, as amended by the Foreign Investment and National Security Act of 2007 (FISIA)(section 721) and as implemented by Executive Order 11858, as amended and regulations at 31 C.F.R. Part 800.

Commission. Moreover, the CFIUS review process and the findings are confidential.⁶ Again, the parties have not provided the materials which were submitted nor have the parties offered to provide the text of the CFIUS final determination.

It is submitted that the CFIUS review is totally independent from the obligations of the Commission pursuant to the Communications Act of 1934, as amended.

RBC's Opposition to the issues raised by Hamilton, totally utilizes a defense based solely of Hamilton's basis for making his allegations. The substance of the assertions is not addressed by RBC. It is submitted that the lack of any substantive denial by RBC to specific allegations speaks volumes. *See RKO General, Inc.* 47 RR 2d 921 (1980). In the RKO decision, the Commission agreed that the petition did not provide hard evidence to support its allegations but found that RKO skirted the issue as to whether petitioner's allegations were well founded. It must be noted that RBC does not anywhere in its Opposition deny the allegations. It attaches to the Opposition a Declaration of Xian Yong Wu, Vice President of RBC Communications, Inc., the sole member of RBC Licenses, LLC. Mr. Wu does not deny the allegations made by Hamilton. His Declaration, however, merely states that he read the Opposition and it is true.

Section 309(a) of the Communications Act mandates that the Commission may only grant an application upon a finding that the public interest, convenience and necessity would be served by such a grant.

Furthermore, in evaluating a request under 309(d)(1), the Commission must proceed "in the assumption that the specific facts set forth [in the Petition] are true. *See Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985).

⁶ Undersigned counsel was unable to obtain any information. Moreover, he was told that the office was prohibited from even confirming that it was reviewing the matter at hand.

In *Gencom, Inc. v. FCC*, 265 U.S. App. D.C. 403, 832 F.2d 171 (D.C. 1987), the Court held the following:

The Commission's inquiry at this level is much like that performed by a trial judge considering a motion for a directed verdict. If all the supporting facts alleged in the affidavits [sic] were true, could a reasonable factfinder conclude that the ultimate fact in dispute has been established.

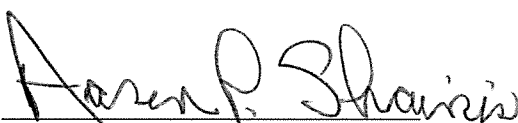
The Commission should also be mindful that the quantum of evidence needed to raise a substantial question is less than that required to prove a case. *See Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998). The Commission should compel RBC to respond to the substantial and material questions of fact which have been raised by Hamilton.

Conclusion

The application of RBC raises questions as to the involvement of the Chinese government. RBC's response does nothing to substantively dispel any of the matters raised by Hamilton. Rather, it reinforces the need for further Commission inquiry. These questions must be pursued by the Commission before it can reach a determination as to whether the application can be granted pursuant to Section 310 of the Act.

Respectfully submitted,

BRETT HAMILTON

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CERTIFICATE OF SERVICE

I, Malinda Markland, do hereby certify that copies of the foregoing “Reply” were sent via First Class U.S. Mail, postage prepaid, this 10th day of June, 2013 to the following:

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