



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

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In Reply Refer to:
1800B3-KV

Sally A. Buckman, Esq.
Lerman Senter PLLC
2000 K Street, NW
Suite 600
Washington, DC 20006

John Renda
Renda Broadcasting Corporation
900 Parish Street
4th Floor
Pittsburgh, PA 15220

David D. Oxenford, Esq.
Wilkinson Barker Knauer, LLP
1800 M Street, N.W.
Suite 800N
Washington, DC 20036

Joseph A. Belisle, III, Esq.
Belisle Law Firm
P.O. Box 970620
Miami, FL 33197

In re: WLVO(FM), San Carlos, Florida
Educational Media Foundation
Facility ID No. 58276
File No. BALH-20150812ABA

Assignment of License

Petition to Deny

Dear Counsel and Petitioner:

The Media Bureau (Bureau) has before it an application for Commission consent to the assignment of the license for station WLVO(FM), San Carlos, Florida (the Station) from Educational

Media Foundation (EMF) to Sun Broadcasting, Inc. (Sun)¹ filed on August 12, 2015, (Application) and amended on April 20, 2016, (Amendment),² and a Petition to Deny (Petition) jointly filed by Beasley Media Group, LLC (Beasley) and Renda Broadcasting Corporation (Renda)³ on September 23, 2015, (Petition).⁴ For the reasons set forth below, we deny the Petition and grant the Application as conditioned herein.

Background. The Station is located in the Fort Myers-Naples-Marco Island Nielsen Metro (Fort Myers Metro). According to the Commission's review, using the BIA Kelsey Media Access Pro Database (BIA), the Fort Myers Metro is home to 39 full-power broadcast radio stations with 23 independent voices. The proposed assignee, Sun, is wholly controlled by the Joseph C. Schwartzel Irrevocable Family Trust of 2011 (Schwartzel Trust)⁵ and its sole officer and director is James W. Schwartzel (James Schwartzel).⁶ If the Application is granted, Sun will hold licenses for six radio stations with four in the same service, and one television station, in the Fort Myers Metro.⁷

Also in the Fort Myers Metro, Fort Myers Broadcasting Company (FMBC)⁸ is licensee of four radio stations and one television station.⁹ The Sun and FMBC stations are located in the common FMBC

¹ Collectively, EMF and Sun will be referred to as the Applicants.

² In the Amendment, Sun attached the "Services Agreement," dated January 1, 2014, (2014 Services Agreement) and an "Amended and Restated Services Agreement," dated April 19, 2016, (Restated Services Agreement). Collectively, the 2014 Services Agreement and the Restated Services Agreement will be referred to as the Services Agreement.

³ Collectively, Beasley and Renda will be referred to as the Petitioners.

⁴ Also before us are: (1) Sun's unopposed "Motion for Extension of Time" dated October 7, 2015; (2) Sun's "Opposition to Petition to Deny" (Opposition) filed on October 19, 2015; (3) Petitioners' "Reply to Opposition to Petition to Deny" (Reply) filed on October 29, 2015; and (4) Petitioners' "Comments on Amendment," filed May 6, 2016 (Comments).

⁵ Application, Exhibit 13. The Schwartzel Trust is a family trust created by Joseph C. Schwartzel, Grantor, with James W. Schwartzel as Co-Trustee/Beneficiary (50% voting holder and 50% assets), Anne Shoemaker as Co-Trustee (50% voting holder) and Miriam D. Schwartzel as Beneficiary (50% of the assets). *Id.* The Schwartzel Trust holds 100% of the votes in Sun and is its sole attributable owner (with 25% of the assets). *Id.*

⁶ *Id.*

⁷ Currently, in the Fort Myers Metro, Sun holds the following full-service broadcast licenses: WARO(FM), Naples, Florida, WFSX-FM, Estero, Florida, WXNX(FM), Sanibel, Florida, WFWN(AM), Fort Myers, Florida, WNOG(AM), Naples, Florida and WXCW(TV), Naples, Florida.

⁸ According to its 2015 Ownership Report (File No. BOA-20151112AAD), FMBC's ownership structure is as follows: Brian A. McBride Revocable Trust, Brian A. McBride, Trustee (3.33%); Edward McBride (6.66%); Maureen McBride (2.0%); Rita M. McBride Irrevocable Trust of 2012 FBO Lineal Descendants of Brian A. McBride DTD 03/02/12, Brian P. McBride and Collen L. McBride, Co-Trustees (12.22%); Rita M. McBride Irrevocable Trust of 2012 FBO Lineal Descendants of Maureen McBride DTD 03/02/12 Brian A. McBride, Trustee (8.23%); , Rita M. McBride Irrevocable Trust of 2012 FBO Lineal Descendants of Kathleen M. Plum DTD 03/02/12, Brian A. McBride, Trustee (8.23%); Kathleen M. Plum Business Trust, U/A DTD 7/24/04, Kathleen M. Plum, Trustee (2.0%); Thomas Martin McBride Family Trust, U/A DTD 11/20/02, Linda J. McBride, Trustee (6.66%); Fort Myers Broadcasting Company Arthur B. McBride Trust #1, Brian A. McBride Trustee (16.89%); Fort Myers Broadcasting Company Arthur B. McBride Trust #2, Maureen McBride, Trustee (16.89%); and Fort Myers Broadcasting Company Arthur B. McBride Trust #3, Kathleen M. Plum Trustee 16.89%). In addition, FMBC's officers and directors are: Brian A. McBride (Officer/Director); Maureen McBride (Officer/Director); Rita McBride (Director); Kathleen M. Plum (Officer/Director); Linda J. McBride (Director); and James L. Davis, Jr (Officer).

⁹ Specifically, WINK-FM, Fort Myers, Florida, WJUA(AM), Pine Island Center, Florida, WTLQ-FM, Punta Rassa, Florida, and WNPL(AM), Golden Gate, Florida, and WINK-TV, Fort Myers, Florida.

owned building, called "Broadcast Center."¹⁰ Pursuant to staff request,¹¹ Sun amended the Application to include its 2014 Services Agreement, executed on January 1, 2014, and Restated Services Agreement, executed on April 19, 2016, with FMBC.¹² The 2014 Services Agreement was limited to Sun Station WXCW-TV which received certain services from FMBC including, but not limited to, data processing, accounting, news and engineering.¹³ The 2014 Services Agreement also noted that Sun leased studio and office from FMBC for a monthly rental fee.¹⁴ According to Sun the 2014 Services Agreement contained drafting errors which were corrected by the Restated Services Agreement.¹⁵ Specifically, the Restated Services Agreement: (1) clarified that all Sun stations are included; 2) corrected the monthly rental fee; and 3) stated that the Services Fee is due annually.¹⁶

Pleadings. Petition. Petitioners, competitor licensees in the Fort Myers Metro,¹⁷ argue that the Application violates Section 73.3555 of the FCC's rules because Sun already exceeds the Commission's multiple ownership limits due to its alleged *de facto* control of FMBC. Petitioners contend that Sun and FMBC are competitors in name only, as the true Sun-FMBC relationship is characterized by common management of programming, finances, and personnel. Petitioners claim that James Schwartzel oversees operations of the Sun and FMBC stations and they include:

- an internet media directory printout listing James Schwartzel as Vice President of Sun station WXCW(DT)¹⁸ and General Manager of FMBC station WINK-TV;¹⁹
- news articles identifying James Schwartzel as affiliated with Sun and FMBC;²⁰ internet domain registrations for FMBC²¹ and broadcast-center.com²² listing James Schwartzel as the registrant; and
- a sworn Declaration of Jeff Zito (Zito), a former Sun employee, from October 2013 - January 2015, and current Beasley employee, who states that "Jim Schwartzel had management authority over all facilities and operations in the building."²³

¹⁰ See Opposition at 2.

¹¹ See email from Kim Varner to Joseph Belisle (dated Mar. 1, 2016).

¹² Application, Amendment, Exhibit 1.

¹³ Application, Amendment, Exhibit 1, 2014 Services Agreement at 1.

¹⁴ *Id.*, 2014 Services Agreement at 1, para. 4.

¹⁵ *Id.*, Exhibit 1 at 1.

¹⁶ *Id.*, Exhibit 2, Restated Services Agreement at 1 and Schedule A.

¹⁷ See Petition at 1, note 1.

¹⁸ Petition, Exhibit F (TVNewsCheck.com, printed Sep. 22, 2015).

¹⁹ *Id.*, Exhibit G (TVNewsCheck.com, printed Sep. 22, 2015).

²⁰ *Id.*, Exhibits F-G (AllAccess.com, *WTLT 93 Flips to New Rock 93X*, (dated Jun. 20, 2013) identifying Schwartzel as VP of Sun; Inside Radio.com, *Deal Digest for the Week of Aug. 27, 2015*, (dated Aug. 27, 2015) listing Schwartzel as affiliated with Sun; and Adweek.com, *Florida GOP Tells WINK to Stop Running Political Attack Ad*, (dated Jan. 27, 2014) identifying James Schwartzel as WINK's Director of Sales).

²¹ *Id.*, Exhibit H.

²² *Id.*, Exhibit I.

²³ *Id.*, Exhibit B, Declaration of Jeff Zito (dated Sep. 23, 2015), para. 6. (Zito Declaration I).

Petitioners also contend that the Sun and FMBC stations share studio space, equipment, personnel, and have an integrated hiring process; again citing Zito's declaration.²⁴ Petitioners report that Sun station WXCW(TV) receives its news programming from FMBC station WINK-TV and attach television magazine listings identifying certain broadcasts on WXCW(TV) as "WINK News."²⁵ Additionally, Petitioners attach employment postings for Sun and FMBC which were purportedly posted simultaneously on "broadcast-center.com,"²⁶ news articles indicating that two individuals were simultaneously employed at Sun and FMBC,²⁷ and an individual's resume indicating overlapping employment at Sun and FMBC.²⁸

Petitioners further allege that Sun and FMBC have intermingled finances. In support, they submit broadcast-center.com printouts indicating that payments to both Sun and FMBC can be processed through the site.²⁹ Petitioners also cite a loan agreement between Sun and a financial institution listing FMBC as a guarantor.³⁰ Additionally, they contend that "[s]ales staff for the Sun and FMBC stations share the same office space, which means it is possible . . . that sales and account information is shared."³¹

Opposition. In its Opposition, Sun denies having *de facto* control of the FMBC stations and describes their relationship as a "limited sharing of resources"³² that does not create an attributable interest. Sun contends this resource sharing is reasonable and that other stations in the Fort Myers Metro have similar arrangements.³³

Sun declares that Petitioners' factual allegations "consist of unsworn internet postings and the vague speculative declaration of Beasley's program director, Mr. Zito."³⁴ Sun asserts that it does not

²⁴ Zito states, in pertinent part:

During my time at Sun, I observed that . . . studios and production facilities and equipment . . . were jointly used by Sun's stations and by stations owned by Fort Myers Broadcasting Company.

. . . [T]hat numerous employees simultaneously performed duties for Sun and Fort Myers stations.

. . . [T]hat information flowed freely among all employees in the building.

Id., Exhibit B, Zito Declaration I, paras. 3-5.

²⁵ *Id.*, Exhibits L, M, and N.

²⁶ *Id.*, Exhibit C.

²⁷ *Id.*, Exhibit D (Tuscarawas Bargain Hunter, *On the air: Dover-New Philadelphia Radio Station Debuts on Schedule* (dated Jul. 15, 2015) identifying Dan Slentz (Slentz) as "director of engineering and IT at Fort Myers Broadcasting Company and Sun Broadcasting . . ."; and Statemagazine.com (dated Apr. 17, 2014) stating that Christina Collins "was promoted to manager of the Spanish language stations with Fort Myers Broadcasting and Sun Broadcasting.").

²⁸ *Id.*, (LinkedIn profile of Ashley Buttonow listing overlapping employment as an Associate Producer at WINK-TV and a Production Assistant at Sun).

²⁹ *Id.*, Exhibit J.

³⁰ *Id.*, Exhibit K, Second Amendment to Loan Agreement by and between Sun Broadcasting, Inc. and Sun Trust Bank (dated Nov. 1, 2010).

³¹ *Id.* at 5.

³² Opposition at 8.

³³ *Id.* at 5. (citing Exhibit No. 2, "June 1994 Time Brokerage Agreement.").

³⁴ *Id.* at 7.

share with FMBC any “common officers, directors or shareholders.”³⁵ Regarding James Schwartzel, Sun states that from January 2014 to March 2015, he served as director of sales for FMBC station WINK-TV, but is no longer.³⁶ As for Joseph Schwartzel, Sun reports that he is the general manager for the FMBC stations and has an attributable interest in Sun as grantor of the irrevocable The Schwartzel Trust, its sole voting shareholder, but is not currently an officer, director or voting shareholder of Sun or FMBC.³⁷

Sun acknowledges leasing space in FMBC’s “Broadcast Center,” but states that “[e]ach Sun radio station has a studio in the building, separate from the studios used by FMBC’s radio stations.”³⁸ Sun also states that the Sun and FMBC radio stations maintain their own programming management employees and sales staff.³⁹ Regarding Sun station WXCW(TV), Sun reports that it purchases news programming from FMBC, but that it retains broadcast decision authority over said programs.⁴⁰

As for finances, Sun states that its monetary affairs are separate from FMBC’s. Sun reports that Sun and FMBC own their own transmission facilities; hold their own tower leases; and have separate bank accounts from which they individually pay their respective taxes, insurance, utilities, and employees.⁴¹ Sun also notes that while “FMBC was once a guarantor of a bank loan to Sun. That loan guaranty is no longer in place.”⁴² Additionally, Sun states that neither Sun nor FMBC has an option to acquire the other party. Sun further reports that while certain FMBC domain sites were erroneously registered in James Schwartzel’s name, this has been corrected.⁴³ Specifically, Sun states that:

the websites of both FMBC and Sun link to a common secure host site that is used to post information and to service electronic payment transactions. This host site, broadcast-center.com, is not designed to function as a website available to the public . . . [but] to support the separate websites of FMBC’s and Sun’s individual stations.”⁴⁴

Regarding personnel, Sun acknowledges that “Sun and FMBC sometimes employ the same personnel.”⁴⁵ Sun notes that these employees are generally part-time or hourly employees and that “when they are working for Sun they clock in as Sun employees and are paid by Sun.”⁴⁶ Sun further reports that the FMBC service providers, contracted under the Services Agreement, “work under the supervision and direction of FMBC’s general manager, Joseph C. Schwartzel. James W. Schwartzel is aware of the nature and quality of the services . . . [and] reviews these services with FMBC personnel”⁴⁷ Sun notes that

³⁵ *Id.* at 1. (citing an FMBC 2013 Ownership Report (File No. BOA-20131119AJI). *Id.*, note 2).

³⁶ *Id.* at 3, note 3; and Schwartzel Declaration at 5.

³⁷ *Id.* at 2; and Schwartzel Declaration at 1.

³⁸ *Id.* at 3; and Schwartzel Declaration at 1-2.

³⁹ *Id.*; and Schwartzel Declaration at 2.

⁴⁰ *Id.*

⁴¹ *Id.* at 2-3; and Schwartzel Declaration 1-3.

⁴² *Id.* at 2; and Schwartzel Declaration at 4.

⁴³ *Id.* at note 4; and Schwartzel Declaration at 4. Additionally, James Schwartzel states “I do not know why I appeared as the registrant of these [certain FMBC websites] domain names.” *Id.*

⁴⁴ *Id.* at 4-5; and Schwartzel Declaration at 3 (“Persons using the payment function of a Sun station website are directed to the Sun payment page of the Broadcast-Center.com website and their payments are deposited in a Sun bank account.”).

⁴⁵ *Id.* at 4; and Schwartzel Declaration at 2-3.

⁴⁶ *Id.*; and Schwartzel Declaration at 3.

⁴⁷ *Id.* at 3-4; and Schwartzel Declaration at 3.

“FMBC personnel administer the dissemination of information for both FMBC and Sun job postings”⁴⁸ but that “the personnel decisions of Sun and FMBC are made by each licensee’s separate management.”⁴⁹

Reply. In its Reply, Petitioners allege that Sun, in its Opposition, fails to address: (1) whether Sun and FMBC share production facilities, office space, and equipment; (2) the details concerning the terminated loan guaranty by FMBC; and (3) the exact administrative services it purchases from FMBC. Petitioners also report that certain Sun and FMBC website registrations are still incorrect.⁵⁰ Regarding station WXCW(TV), Petitioners opine that “Sun makes no claim that the two *television* stations in the building – Sun’s WXCW(TV) and FMBC’s WINK-TV – have separate studios.”⁵¹ Petitioners also note that Sun does not state whether WXCW(TV) employs its own programming and sales staff. As for the employees it shares with FMBC, Petitioners note that Sun does not identify their number or titles. Additionally, Petitioners dispute Sun’s claim that the FMBC employees providing services to Sun do not consider themselves Sun employees.⁵² Moreover, Petitioners argue, if Sun principal James Schwartzel does not supervise the FMBC employees providing services to Sun, then “Sun has abdicated responsibility over key station functions.”⁵³ Petitioners also dispute that Joseph Schwartzel is the FMBC’s general manager, citing a second declaration from Zito stating that Joseph Schwartzel was “rarely” present in the building while James Schwartzel was present on “most days.”⁵⁴ Petitioners further argue alternatively that if Joseph Schwartzel, who holds an attributable interest in Sun as grantor of the irrevocable The Schwartzel Trust through his familial relationships⁵⁵ with Co-Trustees James Schwartzel (Son) and Anne Shoemaker (Sister), is in fact general manager of FMBC’s stations, then he “exerts significant influence and control over the operations of both Sun and FMBC”⁵⁶

Discussion. Section 310(d) of the Act,⁵⁷ requires the Commission to determine whether the proposed transfer or assignment of a broadcast license would be in the public interest. Pursuant to Section 309(d)(1) of the Act,⁵⁸ any party in interest may file a petition to deny an application. In order to assess the merits of a petition to deny, a two-step analysis is required. First, the petition must make

⁴⁸ *Id.* at 4; and Schwartzel Declaration at 4.

⁴⁹ *Id.*; and Schwartzel Declaration at 2.

⁵⁰ Petitioners state that WXCW(TV)’s website registration is listed as “Sun Myers Broadcasting” (Reply at 7 note 27, citing Exhibit C, *Whois Lookup* (dated Oct. 27, 2015)) and other Sun websites list an FMBC e-mail address for the registrant and contact and an FMBC telephone number. (citing *Id.*, Exhibit D, *Whois Lookup* (dated Oct. 27, 2015), *Fort Myers, FL Business Directory*, *Bloomberg Business* (dated Oct. 29, 2015) and *BuzzFile.com* (dated Oct. 29, 2015)).

⁵¹ Reply at 2. (emphasis original) (footnote omitted).

⁵² Petitioners cite news articles in which one employee, Slentz, identified himself as “the director of engineering and IT for FMBC and Sun.” *Id.* at 4, note 11 (citing *supra* note 30 and links to other news articles).

⁵³ *Id.* at 5.

⁵⁴ *Id.*, Exhibit A, Declaration of Jeff Zito, paras. 3-4 (dated Oct. 29, 2015) (Zito Declaration II). Zito also reiterates that “Jim Schwartzel held management authority over all of the radio and television stations in the building, and made decisions regarding all stations’ programming, personnel and finances.” *Id.* at para. 5.

⁵⁵ See *supra* note 5. 47 CFR § 73.3555 Note 2(d). (“If the trustee has a familial . . . relationship to the grantor . . . the grantor . . . will be attributed with the stock interests held in trust.”). Here, Sun acknowledges that the Schwartzel Trust Co-Trustee James Schwartzel is Joseph Schwartzel’s son and Co-Trustee Anne Shoemaker is Joseph Schwartzel’s sister. Opposition at 2.

⁵⁶ Reply at 5-6. Petitioners also note that a 2015 industry directory identifies Joseph Schwartzel as manager of WXCW(TV). (See *Id.*, Exhibit B, *2015 Complete Television, Radio & Cable Industry Directory*).

⁵⁷ 47 U.S.C. § 310(d).

⁵⁸ 47 U.S.C. § 309(d)(1).

specific allegations of fact sufficient to demonstrate that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.⁵⁹ This threshold determination is made by evaluating the petition and the supporting affidavits. If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact calling for further inquiry and requiring resolution in a hearing.⁶⁰ If no such question is raised, the Commission will deny the petition and grant the application if it concludes that such grant otherwise serves the public interest, convenience, and necessity.

Procedural Issues. Unauthorized pleading. Section 1.45 of the FCC's rules specifies a pleading cycle of petition, opposition, and reply.⁶¹ All other pleadings are unauthorized and are subject to dismissal without consideration.⁶² Accordingly, Petitioners' May 6, 2016, filing styled "Comments" constitutes an unauthorized pleading that we will dismiss without further consideration.

Articles and Internet Postings. To the extent that Petitioners and Sun reference news articles and internet postings by third parties as evidentiary support for their arguments, the Commission has found such information to be the equivalent of hearsay⁶³ and cannot act as a substitute for affidavits based on personal knowledge that are required to substantiate serious allegations.⁶⁴ Accordingly, we will not consider these materials.

Substantive Issue. Under Section 73.3555(a)(1)(ii)⁶⁵ of the FCC's rules, a single entity in the Fort Myers Metro may hold an attributable interest in up to seven commercial radio stations, with four in the same service, and one television station. The Application indicates that upon consummation of the proposed transaction, Sun will own four FM stations, two AM stations and one television station in the Fort Myers Metro. If, however, FMBC's stations (two AM, two FM, and one television) are attributed to

⁵⁹ See *id.*; *Astroline Commc'ns Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

⁶⁰ 47 U.S.C. § 309(d)(2).

⁶¹ 47 CFR § 1.45.

⁶² See, e.g., *Saga Commc'ns of New England, LLC*, Letter, 30 FCC Rcd 4654 n. 1 (MB 2015) (dismissing without consideration all unauthorized pleadings); and *Wilks License Co.-Columbus LLC*, Letter, 28 FCC Rcd 8925 n.5 (MB 2013) (declining to consider unauthorized pleadings).

⁶³ See *Johnson v. United States*, 628 F.2d 187, 190-191 (D.C. Cir. 1980) (the weight to be accorded to a hearsay statement depends on its truthfulness, reasonableness, and credibility). See also *Living Proof, Inc. Big Pine, California*, Letter Order, 24 FCC Rcd 2382, 2385, n.29 (MB 2009) (declining to credit hearsay statements of third party).

⁶⁴ See *Casa de Oracion Getsemani, Ephese French SDA Church, Zion Bible Institute, Brown Student Radio, and Providence Cmty. Radio*, Memorandum Opinion and Order, 23 FCC Rcd 4118, 4133 n.76 (2008) ("The Commission has consistently held that newspaper articles and magazine articles are the equivalent of hearsay and do not meet the specificity and personal knowledge requirements in a petition to deny."); and *Secret Comm'cns II, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 9139, 9149, para. 24 (2003) ("allegations based on internet website idiom are speculative and inadequate to raise a substantial and material question of fact") (*Secret*). This is not to say that all online postings are unreliable evidence. In particular, internet postings authored by a party to a proceeding may be credible evidence. For example, the Enforcement Bureau has relied on internet and social media postings as part of their investigations into unlicensed broadcasting. See, e.g., *Fabrice Polynice*, Forfeiture Order, 28 FCC Rcd 4297, 4298-99, para. 4 (EB 2013) (pirate radio operator "acknowledged the unlicensed radio station on 90.1 FM on his webpages."). Here, however, the referenced online articles and postings were made by third parties, who are not Sun or FMBC principals and, therefore, we do not find these to be probative evidence.

⁶⁵ 47 CFR § 73.3555(a)(1)(ii).

Sun, then Application is not grantable because Sun currently exceeds the Commission's multiple ownership limits.

As there is no common ownership between Sun and FMBC, at issue in this case is whether the Sun-FMBC connection is such that the FMBC stations should be attributed to Sun. The Commission's attribution benchmarks, set forth in Note 2 to Section 73.3555 of the FCC's rules,⁶⁶ seek to identify those ownership interests that "have a realistic potential to affect the programming decisions of licensees or other core operating functions."⁶⁷ An entity or party with *de facto* control over an applicant would necessarily have an attributable interest.⁶⁸ The Commission analyzes *de facto* control issues on a case-by-case basis.⁶⁹ In determining whether an entity has *de facto* control of an applicant or licensee, the Commission has traditionally looked beyond the legal title and financial interests to determine who controls the basic operating policies of the station.⁷⁰ In particular, the Commission examines the policies governing station programming, personnel, and finances. The Commission has long held that a licensee may delegate day-to-day operations without surrendering *de facto* control, so long as the licensee continues to set the policies governing these three indicia of control.⁷¹

Sun and FMBC participate in what the Commission defines as a "shared services agreement" (SSA)⁷² whereby Sun purchases certain services from FMBC. Recently, the Commission specifically declined to make SSAs attributable.⁷³ It noted that through SSAs "competitive stations in a local market are able to combine certain operations, with effectively the same station personnel handling or facilities

⁶⁶ 47 CFR § 73.3555, Note 2.

⁶⁷ *Review of The Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559, 12560, para. 1 (1999), *subsequent hist. omitted*.

⁶⁸ See e.g. *KICG(FM)*, Letter, 28 FCC Rcd 10115, 10124, para. 6 (MB 2013) ("[a]n entity or party with control over an applicant, whether *de facto* or *de jure*, would necessarily have an attributable interest"); *Spirit Communications, Inc.*, Letter, 23 FCC Rcd 12665, 12670 (MB 2008); and *Piedmont Television of Springfield*, Letter, 22 FCC Rcd 13910, 13913 (MB 2007).

⁶⁹ See *Shareholders of Hispanic Broad., Inc.*, 18 FCC Rcd 18834, 18843, para. 62 (2003); and *Arnold L. Chase*, Decision, 5 FCC Rcd 1642, 1643, para. 9 (1990).

⁷⁰ See *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856, 863, para. 17 (1969), *aff'd sub. nom.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

⁷¹ See *WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8142, para. 11 (1995); and *Choctaw Broad. Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 8534, 8539, para. 11 (1997) (*Choctaw*).

⁷² The Commission has defined an SSA as:

Any agreement or series of agreements, whether written or oral, in which (1) a station provides any station related services, including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not directly or indirectly under common *de jure* control permitted under the Commission's regulations; or (2) stations that are not directly or indirectly under common *de jure* control permitted under the Commission's regulations collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations.

In the Matter of the 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 14-50, Second Report and Order, 31 FCC Rcd 9894, 10012, para. 349 (2016) (*Quadrennial Review*).

⁷³ *Id.* at 10022, para. 377. In particular, with respect to SSAs, the Commission limited its action to defining the term SSA and requiring disclosure by commercial television stations in the station's online public file. *Id.* at 10012-10018.

performing functions for multiple, independently owned stations,”⁷⁴ and opined that such “resource sharing can deliver meaningful public interest benefits”⁷⁵ In light of these pronouncements, we do not find that the Sun-FMBC Services Agreement, either as originally drafted or as restated, triggers the Commission’s attribution rules. In any event, we note that Petitioners’ reliance on the existence of the SSAs to show that Sun has “potentially abdicated control over important station functions”⁷⁶ conflicts with their basic argument that Sun controls FMBC.

We further find no indicia of *de facto* control present in this case. With regard to programming, the Commission traditionally considers, the licensee’s ability to reject or preempt programming.⁷⁷ Here while Sun receives FMBC only news programming – not the entirety of its stations programming -- under the Services Agreement, Sun asserts that it “is free to accept or reject any of the news programming supplied by FMBC.”⁷⁸ Moreover, the Services Agreement does not give FMBC a contractual right to have its news programming broadcast, nor does it penalize Sun for rejecting said news programming. In addition, the Services Agreement stipulates that “Sun will have complete control of the Stations and their programming.”⁷⁹ Petitioners have failed to present any contrary evidence.

Regarding personnel, Sun states that it “sometimes” shares employees with FMBC, typically, these are “part-time or hourly employees.”⁸⁰ According to BIA data, Sun and FMBC share the following management level employees: Michael Remaley, Sales Manager; Jack Spiess, Chief Engineer; and Donna Ullio, Traffic Director. Under Commission case law, the sharing of employees “does not [*per se*] constitute an indicium of unauthorized control, provided that the employee reported to and was supervised by the appropriate party when undertaking his or her duties.”⁸¹ As addressed in more detail below, Petitioners present no probative evidence that these apparently shared employees are not appropriately supervised.

Regarding the roles of Joseph and James Schwartzel, Sun acknowledges that Joseph Schwartzel is an attributable Sun interest holder, but states that he has not been a Sun officer since August 2013. Recent BIA data, however, continues to list Joseph Schwartzel as Sun’s President. As for James Schwartzel, Sun acknowledges that from January 2014 to March 2015, he served as director of sales for FMBC station WINK-TV, but no longer holds that role.⁸² Recent BIA data, however, continues to list James Schwartzel as General Manager for WINK-TV. Because BIA data apparently does not reflect the current roles of Joseph and James Schwartzel, we will require Sun and FBMC to update this

⁷⁴ Id. at 10008, para. 337.

⁷⁵ Id. at 10009, para. 341.

⁷⁶ Comments at 4. We note that the Comments are not being reviewed due to procedural grounds, *see supra*, but are cited for illustrative purposes only.

⁷⁷ *Choctaw*, 12 FCC Rcd at 8539, para. 12; *see also Annabelle Savage, Chapter 7 Trustee, Universal Broad., Inc., Assignor*, Memorandum Opinion and Order and Notice of Apparent Liability, 25 FCC Rcd 3665, 3671, para 17 (MB 2010) (declaring “unenforceable” as directly conflicting with the requirement that licensee retain ultimate control over a station the term in a time brokerage agreement providing that the licensee could be considered in default if she preempted or refused to broadcast more than 10 percent of the programming presented under the agreement).

⁷⁸ Opposition, Exhibit No. 1, Schwartzel Declaration at 2.

⁷⁹ Application, Amendment, Exhibit 2, 2014 Services Agreement at 1, para. 5, and Restated Services Agreement at 1, para. 5.

⁸⁰ Opposition at 4, and Exhibit No. 1, James Schwartzel Declaration at 2.

⁸¹ *Clear Channel Broad. Licenses, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 14078, 14095 para. 39 (MB 2009) (citing *Clear Channel Broad. Licenses, Inc.*, 22 FCC Rcd 21196, 21206, para. 26 (2007)).

⁸² Id. at 3, note 3; and Schwartzel Declaration at 5.

information.⁸³

Sun further denies that James Schwartzel controls the operations of the FMBC stations.⁸⁴ Petitioners, however, dispute Sun's accounting of the roles of Joseph and James Schwartzel. Specifically, they cite Zito's testimony that Joseph Schwartzel was "rarely" on site, but "Jim Schwartzel was present on most days and held management authority over all the radio and television stations in the building, and made decisions regarding all stations' programming, personnel, and finances."⁸⁵ The Zito Declarations, however, fail to provide meaningful details, based on Zito's personal knowledge, as to any specific decisions made or actions taken by James Schwartzel regarding the FMBC stations. Moreover, as a current employee of Petitioner Beasley, Zito is not a disinterested party.⁸⁶ Accordingly, the Zito Declarations, however specific, do not form the basis of a substantial and material question of fact regarding *de facto* control of Sun or FMBC.

As for finances, Sun asserts that its finances are wholly separate from FMBC's. Sun cites James Schwartzel's sworn testimony that Sun alone pays all its stations' expenses, including tower leases, taxes, utilities, insurance, and employees.⁸⁷ Petitioners do not include any credible evidence to refute this. Sun acknowledges that its leases office and studio space for its stations in the FMBC building Broadcast Center.⁸⁸ Petitioners cite no Commission precedent prohibiting this leasing arrangement. Regarding the referenced Sun bank loan, Sun reports that FMBC is no longer a guarantor.⁸⁹ The Commission has long held that guarantees are not attributable until exercised.⁹⁰ With respect to the processing of electronic payments, Sun states that the "host site broadcast-center.com is not designed to function as a website to the public . . . [but rather] to support the separate websites of FMBC's and Sun's individual stations."⁹¹ We find that a common online payment portal that directs payments to the appropriate financial account does not constitute a loss of control over finances.⁹² As for the apparent errors certain FMBC and Sun website registrations, we do not find this to be indicative of control.⁹³

⁸³ Sun and FMBC should take this opportunity to review and request correction of any other erroneous BIA management or employee listings.

⁸⁴ *Id.*, and James Schwartzel Declaration at 2.

⁸⁵ Reply, Exhibit A, Zito Declaration II, paras. 3-4. Zito makes a similar statement in the Zito Declaration I ("Jim Schwartzel had management authority over all facilities and operations in the building.") Petition, Exhibit B, Zito Declaration I, para. 6.

⁸⁶ See, e.g., *Janice Fay Surber*, Decision, 5 FCC Rcd 6155, 6158, para. 18 (Rev. Bd. 1990) ("A prime indicium of probity is whether the declarants are disinterested witnesses") (citations omitted); *Iglesia Jesucristo Es Mi Refugio, Inc.*, Memorandum Opinion Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 16310, 16319, para. 25 (MB 2010) (petitioner's consultant's statement, uncorroborated by independent documentation, should be given little weight because he was not a disinterested witness); and *Second Samoan Congregation Church*, Letter Order, 23 FCC Rcd 16630, 16636 (MB 2008) (applicant's counsel's statements should be given little weight because he is not a disinterested witness).

⁸⁷ Opposition, Exhibit No. 1, Schwartzel Declaration at 1-3.

⁸⁸ See Application, Amendment, Exhibit 2, Restated Services Agreement at 1, para. 4.

⁸⁹ *Id.* at 4.

⁹⁰ See, e.g., *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interest*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097, 1112-13, paras. 31-32 (2001).

⁹¹ Opposition at 4.

⁹² We also note that a Commission staff member was unable to access the website by using the url "broadcast-center.com."

⁹³ The Commission "has no restrictions that uniquely apply to websites and 'the content of station websites is wholly irrelevant to the determination of station control.'" *J. Stewart Bryan III & Media General Commc'ns Holdings, LLC*,

In sum, then, based on the record evidence in this proceeding, we find that Petitioners have not raised a substantial and material question of fact calling for further inquiry regarding whether Sun has *de facto* control of and/or an attributable interest in FMBC, or whether FMBC has *de facto* control or an attributable interest in Sun. However, our approval of the Application here will be subject to the condition that, prior to consummation of the transaction, Sun request that BIA update its records to reflect the current roles of Joseph Schwartzel and James Schwartzel at Sun and FMBC. Upon fulfillment of this condition, we find that the transaction, as conditioned, complies with the local radio ownership rules.

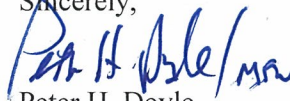
Conclusion/Actions. We have examined the Application and find that EMF is qualified to assign, and, upon satisfaction of the conditions described immediately below, Sun is qualified to hold, the Station's license. We also find on that basis that grant of the Application would further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, that the September 23, 2015, Petition to Deny jointly filed by Beasley Media Group, LLC and Renda Broadcasting Corporation IS DENIED.

IT IS FURTHER ORDERED, that the May 6, 2016, Comments on Amendment jointly filed by Beasley Media Group, LLC and Renda Broadcasting Corporation IS DISMISSED.

IT IS FURTHER ORDERED, that the application (File No. BALH-20150812ABA) for assignment of the WLVO(FM) license from Educational Media Foundation to Sun Broadcasting, Inc., IS GRANTED, CONDITIONED UPON Sun Broadcasting Corporation's submission to the Bureau, prior to consummation, a sworn statement that Sun has requested that BIA update its records to reflect current roles of Joseph Schwartzel and James Schwartzel at Sun Broadcasting, Inc. and Fort Myers Broadcasting Company.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

Memorandum Opinion and Order, 28 FCC 15509, 15516, para. 17 (MB 2013) (quoting *Kathryn R. Schmeltzer, Esq.*, Letter, 19 FCC Rcd 3897, 3900 (MB 2004)). *See also* *Richard F. Swift, Esq.*, Letter, 26 FCC Rcd 15567, 15571 (MB 2011) (finding Station website content not probative on the issue of *de facto* control). We do, however, caution Sun to be attentive to its websites. *See Secret*, 18 FCC Rcd at 9149, para. 24. ("While we recommend that licensees be attentive to their website depictions . . .").