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September 20, 2006

BY HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
Washington, D.C. 20554

**Re: Applications for Transfer of Control
KSTR-TV, Irving, Texas (File No. BTCCT-20060718AHS)
KUVN-TV, Garland, Texas (File No. BTCCT-20060718AIK)
KDXX(FM), Benbrook, Texas (File No. BTCH-20060718AJQ)
KTFQ-TV, Albuquerque, New Mexico (File No. BTCCT-20060718AJF)
KQBT(FM), Rio Rancho, New Mexico (File No. BTCH-20060718AET)**

Comments of Broadcasting Media Partners Inc. on Late-Filed "Petition to Deny" of Rincon & Associates, Dr. Edward Rincon and Conrad E. Gomez

Dear Ms. Dortch:

Broadcasting Media Partners Inc. ("BMPI" or the "Transferee"), the proposed transferee in the above-referenced applications (the "Applications") for consent to the transfer of control of Univision Communications Inc. and its licensee subsidiaries (collectively, "Univision"), by its attorneys, hereby comments on the submission, styled "Petition to Deny," filed on September 5, 2006 (the "September 5 Submission"), by Rincon & Associates, Dr. Edward Rincon and Conrad E. Gomez (collectively, "Rincon"). 1/

1/ The September 5 Submission erroneously lists the community of license of KSTR-TV, KUVN-TV and KDXX(FM) as "Dallas, TX," and of KQBT(FM) as "Albuquerque [sic], NM." The correct community of license of each of the stations that is the purported subject of the September 5 Submission is listed above. On September 11, 2006, Rincon filed a further submission, styled "Nunc Pro Tunc Petition to Deny," which, among other changes, deleted the KSTR-TV application file number from the files as to which relief is sought.

INTRODUCTION

By Rincon's own admission (*see* September 5 Submission at n.1), the September 5 Submission was filed nearly two weeks after the August 23, 2006, expiration of the public comment period with respect to the Applications. Rincon did not seek an extension of time and has not demonstrated good cause for the acceptance of its untimely filing, which therefore should be summarily dismissed. Even if considered on the merits, the September 5 Submission fails to raise any issue of material fact with respect to Transferee's qualifications or any other matter relevant to or affecting the Commission's consideration of the Applications under the public interest standard. Accordingly, to the extent it is not dismissed for its procedural failings, the September 5 Submission should be denied and the Applications granted promptly.

I. THE SEPTEMBER 5 SUBMISSION IS UNTIMELY AS A PETITION TO DENY AND SHOULD BE DISMISSED.

A. Rincon Has Not Demonstrated Good Cause for Acceptance or Consideration of the September 5 Submission.

A petition to deny must be filed "not later than 30 days after issuance of a public notice of the acceptance for filing of the applications" to which it is directed. 47 C.F.R. § 73.3584(a). "Untimely Petitions to Deny . . . are subject to return by the FCC's staff without consideration." 47 C.F.R. § 73.3584(e). The Commission has rejected petitions where, as here, the petitioner failed to demonstrate good cause for acceptance of its late filed submission. *See, e.g., WGSN Radio, Inc.*, 2 FCC Rcd 4565, 4568 n.2 (MMB 1987).

The FCC Public Notice of the acceptance for filing of the Applications was released on July 24, 2006. *See Public Notice*, Broadcast Applications, No. 26283 (July 24, 2006). Petitions to deny therefore were due no later than August 23, 2006. Rincon's only explanation for its late filing -- fully 13 days thereafter -- is that it "had at least 10 days less time than the time contemplated in 47 C.F.R. § 73.3584 to prepare [its] Petition due to lack of access to critical filings only accessible in CDBS." September 5 Submission at n.1.

Rincon's argument lacks specificity and is unsupported by affidavit or declaration. Rather, it attempts to bootstrap from the Media Bureau's August 1, 2006, Public Notice granting a limited 10-day filing extension in order to address certain "electronic filing difficulties" that had been reported with respect to renewal applications, EEO reports and ownership reports required to be filed electronically *via* the FCC's Consolidated Database System ("CDBS") by August 1, 2006. *See Public Notice*, "Media Bureau Announces Extension of Certain Filing Deadlines," DA 06-1571 (Aug. 1, 2006) (extending August 1 filing window in order "to provide a reasonable opportunity for impacted licensees and CDBS users to timely file these forms"). But petitions to deny the Applications were not due until August 23, 2006, and in any case were required to be filed on paper, not *via* CDBS. Furthermore, other than its generic and unsubstantiated claim of "lack of access to critical filings" (September 5 Submission at n.1), Rincon does not allege, much less demonstrate, a single instance during the 30-day public notice period in which it tried and failed to access the Applications *via* CDBS. Even assuming for

purposes of argument that Rincon attempted to access the Applications *via* CDBS, and further assuming that CDBS was unavailable on those occasions when it did so, Rincon could have obtained the Applications by other means -- for example, by retrieving the Applications from the public inspection files of the Univision stations or requesting copies from counsel -- with ample time to meet the August 23 petition filing deadline.

Had Rincon actually tried, and failed, to obtain the Applications, and had it actually been concerned that this failure would prevent it from filing a petition by the August 23 deadline, then Rincon was obligated prospectively to seek an extension of time to file. Pursuant to Section 1.46 of the Commission's Rules, Rincon could have requested an extension as late as August 23, subject only to prior oral notification by Rincon of all parties and Commission staff. *See* 47 C.F.R. § 1.46(c). Instead, Rincon continued to work on its submission well after the deadline had passed without notifying the parties or Commission staff either of its intent to file or of the reasons for its purported inability to do so in a timely manner.

Rincon has failed to demonstrate "good cause" for the acceptance of its late filing. Under the circumstances and consistent with Commission precedent, the September 5 Submission should be dismissed. *See, e.g., Texas Coast Broadcasting, Inc.*, 11 FCC Rcd 1688 (para. 5) (1996) (rejecting late-filed declaration in support of petition to deny because petitioner "failed to establish good cause for its late filing").

II. EVEN IF CONSIDERED ON THE MERITS, THE SEPTEMBER 5 SUBMISSION FAILS TO MAKE A PRIMA FACIE SHOWING THAT GRANT OF THE APPLICATIONS WOULD DISSERVE THE PUBLIC INTEREST.

A party challenging an application by means of a petition to deny and seeking a hearing must satisfy the two-part test established in Section 309(d) of the Act. *See* 47 U.S.C. § 309(d)(1) and (2). As a threshold matter, a petitioner's allegations must be sufficient to establish a *prima facie* showing that a grant of the application would be inconsistent with the public interest. *See Astroline Communications Co. Ltd. Partnership v. F.C.C.*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). In order to make out a *prima facie* showing, the petitioner "must show the necessary specificity and support; mere conclusory allegations are not sufficient." *Kola, Inc.*, 11 FCC Rcd 14297, 14305 (para. 15) (1996) (quoting *Beaumont Branch of the NAACP v. F.C.C.*, 854 F.2d 501, 507 (D.C. Cir. 1988)); *see also Texas RSA 1 Ltd. Partnership*, 7 FCC Rcd 6584, 6585 (para. 8) (1992) (rejecting a petition to deny for failure to make a *prima facie* showing where it was "replete with conclusory allegations unsupported by specific facts"). 2/

The September 5 Submission fails even to approach, much less cross, this evidentiary threshold or otherwise to establish that grant of the Applications would disserve the

2/ If the Commission finds that a petitioner has alleged a *prima facie* inconsistency with the public interest, the inquiry proceeds to a second phase in which the Commission asks whether, "on the basis of the application, the pleadings filed, or other matters which it may officially notice[,] a substantial and material question of fact is presented." 47 U.S.C. § 309(d)(2).

public interest. ^{3/} As shown below, Rincon has failed to adduce any evidence to refute BMPI's demonstration that grant of the requested temporary compliance waiver would not result in undue media concentration in any market. It also has failed to adduce any evidence to support its bald assertion that BMPI "isn't qualified to hold Univision licenses." September 5 Submission at 11. Accordingly, even if considered on the merits, the September 5 Submission should be denied. ^{4/}

A. Rincon Has Not Demonstrated That Grant of a Limited Temporary Media Ownership Waiver Would Disserve the Public Interest.

Rincon alleges "bad faith" by BMPI in seeking a limited, temporary waiver to enable two of its shareholders to come into compliance with certain of the Commission's media ownership rules. *See* September 5 Submission at 15. But Rincon has adduced no evidence either to support its claim "that Univision [under the control of BMPI] does not intend to divest itself of any of the stations," *id.*, or otherwise to demonstrate that grant of a temporary waiver here would be inconsistent with precedent or disserve the public interest. ^{5/}

As discussed in detail in the Applications, *see* FCC Form 315, Section IV, Question 8(b), Transferee's Exhibit 18-B, a temporary waiver has been requested here to permit the orderly disposition of certain non-controlling, attributable interests held by two parties to BMPI's portion of the Applications. ^{6/} BMPI presented voluminous evidence of both the highly

^{3/} Rincon also fails to satisfy the fundamental requirements to establish standing with respect to three of the five Univision stations that are the subject of the September 5 Submission because the declarations in support of its submission allege viewership only with respect to KTFQ-TV and KUVN-TV. They are silent regarding viewership, listenership or residence with respect to KSTR-TV, KDXX(FM) and KQBT(FM). They therefore fail to demonstrate, as they must, "either . . . that the petitioner is a resident of the station's service area, or . . . that the petitioner is a station listener or viewer whose contact with the station is not transient." *Sagittarius Broadcast Corp.*, 18 FCC Rcd 22551, 22554 (para. 5) (2003); *see also Miami Valley Broadcast Corp.*, 78 F.C.C.2d 684, 693 (para. 16) (1980) (where petitioner demonstrated local residence as to only two of many stations involved in a merger transaction, petitioner had standing only with respect to those two stations, and its "[a]llegations pertaining to other stations involved and the merger generally" could not be treated as part of the petition to deny).

^{4/} Certain allegations in the September 5 Submission relating to Univision are addressed separately in its "Opposition to Petition to Deny," being filed concurrently herewith (the "Univision Opposition").

^{5/} As demonstrated in the Univision Opposition at Section III.A., Rincon's allegations regarding Univision's waiver request with respect to its grandfathered Albuquerque station complement are misguided. They also are irrelevant to the Commission's consideration of BMPI's request for temporary waiver and inappropriately conflate Univision, the licensee, and BMPI, the proposed transferee. *See, e.g.*, September 5 Submission at 11, 13, 15 (repeatedly alleging that *Univision* is seeking a temporary waiver of the media ownership rules).

^{6/} These interests are in a total of eight markets out of the 27 television DMAs and 21 radio markets involved in the Univision transaction. Contrary to Rincon's implication, *see* September

competitive nature of the affected markets and the *de minimis* impact of the requested six-month compliance period on competition and diversity in those markets. Specifically with respect to the Dallas market -- the only waiver market implicated by the September 5 Submission and in which only one of BMPI's shareholders has an attributable media interest -- BMPI demonstrated that market viewers and listeners will continue to have access to a wide variety of broadcast and non-broadcast media during the waiver period. *See, e.g.*, FCC Form 315, Section IV, Question 8(b), Transferee's Exhibit 18-B, Appendix G ("Dallas-Fort Worth, Texas DMA"). Rincon has presented no evidence that grant of a temporary waiver to facilitate compliance by one of BMPI's five shareholders with respect to its non-controlling interest in a licensee of radio stations in Dallas would cause undue media concentration.

The Commission routinely has found that the public interest would be served by grant of a temporary waiver of its media ownership rules in order to provide the parties to a multi-station, multi-market transaction adequate time and opportunity following consummation to resolve multiple or cross-ownership conflicts. ^{7/} Particularly in a complex transaction such as this one, involving a public company merger and many stations, the Commission has concluded "that the benefits derived from such transactions support grant of a reasonable waiver period to effectuate the merger and permit time to come into compliance with our rules." ^{8/}

Rincon also has not offered any support for its apparent belief that compliance with the pertinent media ownership rules can be achieved only through divestiture of stations. *See* September 5 Submission at 15. Because the interests implicating the rules here are minority, non-controlling interests, compliance also could be achieved by the transfer of those interests to co-investors, or by restructuring the investments in order to convert them to non-attributable interests pursuant to the Commission's attribution guidelines. *See* notes to 47 C.F.R. § 73.3555. Commission precedent is not to the contrary; indeed, the Commission is, and should be, agnostic as to the means of achieving compliance. *See e.g., Chancellor Media/Shamrock Radio Licenses, L.L.C.*, 15 FCC Rcd 17053, 17058 (para. 14) (2000) (12-month temporary waiver granted to enable assignee to come into compliance by either divestiture "or taking such other action as may be necessary to bring it into compliance" with the media ownership rules); *Milton S. Maltz*, 13 FCC Rcd 15527, 15538 (para. 34) (MMB 1998) (six-month temporary waiver granted to

5 Submission at 10-12, no Spanish-language broadcast stations are involved and therefore none are being added -- even temporarily -- to the Univision station portfolio by virtue of the proposed transaction.

^{7/} *See, e.g., Telemundo Communications Group, Inc.*, 17 FCC Rcd 6958, 6963 (para. 51) (2002); *UTV of San Francisco*, 16 FCC Rcd 14975, 14984 (para. 33) (2001); *Capital Cities Communications, Inc.*, 11 FCC Rcd 5841, 5851 (para. 6) (1996).

^{8/} *Stockholders of CBS, Inc.*, 11 FCC Rcd 3733, 3755 (para. 44) (1995). In *Stockholders of CBS, Inc.* the Commission granted 18 separate temporary or permanent waivers of the media ownership rules to facilitate a strategic acquisition involving transfer of control of 58 broadcast stations. *See id.* at 3736 (para. 2). By comparison, the temporary waiver requested here pertains to minority, non-controlling interests in a total of eight markets affected by a transfer of control of 114 full-power broadcast stations in 27 television and 21 radio station markets.

enable applicant to divest station “or otherwise come into compliance with the broadcast multiple ownership rules”).

B. Rincon Has Not Presented Any Evidence that BMPI Is Not Qualified to Be a Commission Licensee.

The sole basis for Rincon’s allegation that BMPI “isn’t qualified to hold Univision licenses,” September 5 Submission at 11, appears to be that, in Rincon’s view, BMPI’s principals lack the experience and the desire to address and correct Rincon’s perceived deficiencies in Univision’s programming. *See id.* at 24-26. But neither Rincon’s attempt to impugn the background and credentials of one of BMPI’s principals, nor its evident dislike of Univision’s programming, ^{9/} can overcome its failure to adduce any evidence raising a question regarding Transferee’s qualifications under any relevant criteria, to wit, the Act or the Commission’s Rules, the Commission’s Character Qualifications Policy, or the instructions to FCC Form 315.

Rincon’s purported reliance on the Commission’s former comparative criteria in support of its request for a hearing to explore BMPI’s “past broadcast record” and “skill sets,” September 5 Submission at 25-26, is triply wrong. First, the Commission’s comparative criteria were struck down by the Court of Appeals for the District of Columbia Circuit and subsequently replaced by an auction system. *See Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993) (“continued application of the integration preference is arbitrary and capricious, and therefore unlawful”); Balanced Budget Act of 1997, Sec. 3002(a)(1), codified at 47 U.S.C. § 309(j) (“the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding . . . if . . . mutually exclusive applications are accepted for any initial license or construction permit”). Second, and in any case, the comparative criteria did not, and never were contemplated to, apply to applicants for an assignment of license or transfer of control of an operating station. Rather, they were used to award “preferences” to applicants for construction permits for new broadcast stations. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (comparative criteria apply to hearings among applicants for new broadcast facilities). Finally, contrary to Rincon’s implication, *see* September 5 Submission at 24-26, the Commission does not have discretion under the Act to consider the transfer of the Univision stations to any party other than the transferee before it. *See* 47 U.S.C. § 310(d) (“the Commission may not consider whether the public interest, convenience and necessity might be

^{9/} Contrary to Rincon’s contention, *see, e.g.* September 5 Submission at 15-18, programming decisions, like matters of taste, are not within the Commission’s jurisdictional purview. *See, e.g., Starr WNCN, Inc.*, 48 F.C.C.2d 1221, *stay denied*, 50 F.C.C.2d 423 (1974) (format and program responsibility “rests with the judgment of the licensee”); *Corvallis TV Cable Co.*, 59 F.C.C.2d 1282 (para. 9) (1976) (Commission “can neither guarantee nor direct” program offerings by a licensee “or by subsequent licensees”). *See also* Univision Opposition at Section III.B.


served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”) 10/

CONCLUSION

The September 5 Submission is fatally flawed procedurally. Even if considered on the merits, it is devoid of substance warranting Commission consideration. Especially in view of Rincon’s disregard of the Commission’s procedural rules, its untimely submission should not be allowed to disrupt the proceeding and divert scarce Commission resources for the consideration and rejection of its speculative assertions and spurious legal theories. Accordingly, the September 5 Submission should be dismissed and the Applications granted promptly.

Respectfully submitted,

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10/ Rincon’s request that the Commission undertake a broad industry review, *see* September 5 Submission at 26-31, might be an appropriate subject for a petition for inquiry or rulemaking, but is not appropriate for consideration in this adjudicatory proceeding. *See, e.g., Spanish Radio Network*, 10 FCC Rcd 9954, 9956 (para. 9) (1995) (declining to address petitioners’ market definition arguments in the context of an adjudicative proceeding where “the appropriate course of action is to request[] that the Commission institute a generic rule making proceeding to change its current multiple ownership rules and policies”). *Cf. Nextel Communications Inc.*, 20 FCC Rcd 13967 (para. 162) (2005) (declining to impose requested conditions where “none of the petitioners who recommend conditions . . . submitted such proposals in [a related] rulemaking proceeding, which would have been the appropriate vehicle to thoroughly consider such requests”). BMPI notes that the proposed transaction was granted early termination by the Federal Trade Commission and the Department of Justice pursuant to the exercise of their jurisdiction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.