

WAIVER REQUEST

Pursuant to Section 1.3 of the Commission's rules, Electro Optic Systems Holdings Ltd ("EOS") requests a limited waiver of the Commission's rules in connection with its application for transfer of control of the space station license (the "Audacy License") currently controlled by Audacy Corporation ("Audacy"). As shown below, there is good cause for the Commission to grant a limited waiver, to the extent necessary, to allow the proposed transaction, including (1) the electronic filing of a Form 312 application for transfer of control without the electronic signatures of the transferor and/or licensee, and (2) any arguable, momentary exercise of control through exercise of the contractual right to sign on behalf of those parties.

As discussed in the attached narrative, EOS (through its indirect wholly owned subsidiary, EOS Defense Systems USA, Inc. ("EOSDS USA")) proposes that control over the NGSO space station license currently controlled by Audacy be transferred to EOS. The transaction is complicated by the fact that all of the officers and directors of Audacy have resigned. As a result, Audacy does not have the quorum or personnel necessary to adopt official corporate actions. Moreover, Audacy is currently in default on its indebtedness owed to Horizon Technology Finance Corporation ("Horizon"), which indebtedness is secured by a senior lien in favor of Horizon on all of the assets of Audacy.

Horizon intends to exercise some of its rights and remedies solely for the limited purpose of facilitating a private sale of certain assets owned by Audacy, including the membership interests in its subsidiary, Audacy Spectrum LLC ("Audacy Spectrum"),¹ to

¹ The Commission previously granted consent for a *pro forma* assignment of the space station license from Audacy Corporation to Audacy Spectrum LLC. See Consent to Assignment, IBFS File No. SAT-ASG-20180619-00047 (granted June 22, 2018). However, EOS and Horizon understand that Audacy and Audacy Spectrum did not formally consummate the assignment of the Audacy License within 180 days of the grant of Commission consent, as required under the Commission's rules. See 47 C.F.R. § 25.119(f). As

EOSDS USA pursuant to Article 9 of the Uniform Commercial Code (“UCC”). In order to obtain the prior Commission approval required to consummate such a transfer of control transaction, the transferor, transferee, and licensee would normally file an application with the Commission. In this case, however, Audacy has no legal representative authorized and capable of executing the application on its behalf as transferor/licensee. Audacy’s default, however, has given Horizon the legal right to act as attorney-in-fact for Audacy and to initiate proceedings necessary or appropriate to protect Horizon’s rights. Accordingly, Horizon has executed the transfer application in the name of and on behalf of the company.

The application includes all required transferor/licensee information. However, because Audacy does not have the corporate capability to execute the application as contemplated by Sections 1.10010 and 25.112(a)(1) of the Commission’s rules, Horizon has exercised its right to do so in its name and on its behalf. To be clear, Horizon has not attempted to exercise any rights with respect to operations of the licensee or the licensed NGSO satellite system (which, in any case, has not yet been deployed). For example, it has not attempted to foreclose under the UCC, and would not exercise any control over either Audacy or Audacy Spectrum absent Commission consent to a transfer of control of the assets of Audacy, including the membership interest in Audacy Spectrum. Rather, Horizon has exercised its power of attorney for the purpose of filing this application, and has done so in the name of Audacy rather than in its own capacity, so that the Commission can consider a proposed transfer of control of the Audacy License to EOS.

Provided that the Commission has granted its consent, Horizon will convey the assets of Audacy, including Audacy’s membership interest in Audacy Spectrum, to EOSDS USA through a UCC private sale process. Together with the conveyance of the Audacy assets, Horizon will

an intermediate step in the sale of certain assets, Audacy will, upon approval by the Commission, effect this *pro forma* assignment of the Audacy License to Audacy Spectrum.

separately transfer its 1% equity interest in Audacy Spectrum to EOSDS USA. Once the proposed sale is consummated, EOS, through its equity holdings in EOSDS USA, will indirectly own 100% of the equity interest in Audacy Spectrum, which will hold the Audacy License. EOS will also indirectly own certain other assets of Audacy that had been developed or acquired by Audacy in support of Audacy's NGSO system.

The Commission may waive its rules for good cause shown.² "Waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule," including "more effective implementation of overall policy."³ In determining whether waiver is appropriate, the Commission should "take into account considerations of hardship, equity, or more effective implementation of overall policy."⁴ Under the unusual circumstances presented in this case, the Commission should grant the waiver requested herein to the extent necessary.

In granting the Audacy License, the Commission found that the proposed NGSO system would serve the public interest by offering a new platform providing connectivity for other spacecraft to facilitate transmission of information and thereby enable more operators to provide more services in response to technologies and market conditions that continue to evolve rapidly.⁵ Unfortunately, Audacy is no longer in a financial position to deliver on the promise of its system. Clearly, the public interest would be served by allowing a party such as EOS, with the financial and technical resources needed to develop and deploy the Audacy system, to take control of the

² 47 C.F.R. § 1.3. *See also* *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

³ *GE American Communications, Inc.*, 16 FCC Rcd. 11038, ¶ 9 (IB 2001).

⁴ *WAIT Radio*, 418 F.2d at 1159. *See also* 47 C.F.R. § 1.925(b)(3)(ii) (waiver may be granted in wireless service where "the applicant has no reasonable alternative").

⁵ *See Audacy Corp.*, 33 FCC Rcd. 5554, ¶ 21 (2018).

Audacy License and deliver on its promise. But the lack of qualified signatories for Audacy (and Audacy Spectrum) threaten to preclude achievement of this public interest benefit.

The Commission has waived the signature requirement in prior cases where there was no reasonable alternative or where strict adherence to the rule would have frustrated the public interest. For example, in the context of a tender offer where the officers of the target company favored a rival bid, the Commission concluded that it “cannot reasonably allow the technical requirements of the application to make it impossible for an outside party seeking control to file for and obtain prior approval,” and therefore found that “the requirement of the application form for these signatures was properly waived.”⁶ In another transfer of control proceeding where the licensee refused to sign the application because it was not in possession of all material facts, the Commission found that “little additional probative value would be added by [the licensee’s] signature.”⁷ And in a very recent case, the Commission concluded that, where an assignee was unable to locate an official of the assignor entity that had ceased to exist, waiver was appropriate because there was no reasonable alternative.⁸

In each of these cases, the Commission found that adhering to the formalistic requirement for signature would not be consistent with the public interest. That same conclusion applies in this case, where corporate dysfunction threatens to preclude any transaction that could preserve the Audacy License and the public interest benefits recognized by the Commission therein. In these circumstances, the Commission should waive the signature requirement to the extent necessary and accept the signature of Horizon as attorney-in-fact for the transferor and licensee.

⁶ *Continental Tel. Corp.*, 41 F.C.C.2d 957, ¶ 7 (1973).

⁷ See Public Notice, “Liberty Media Corporation Seeks FCC Consent to Transfer De Jure Control of Sirius XM Radio, Inc.,” 27 FCC Rcd. 12059, ¶ 3 (IB 2012).

⁸ See *The Zayo Group, LLC*, DA 20-4, ¶¶ 5, 8 (PSHSB, rel. Jan. 3, 2020).

In the contemplated transaction, ultimately Horizon is to convey the Audacy assets to EOSDS USA. However, this step will only take place if the Commission approves the ultimate transfer of control to EOS. Horizon's only "control" is to invoke the UCC private sale process and will not afford Horizon the opportunity to exercise any real control over the license beyond conveying it, via Audacy Spectrum, to EOS as authorized by the Commission. Accordingly, the Commission should approve the proposed actions by Horizon as part of the overall proposed transaction, including any necessary waiver(s).