

Legal Report to the City of Seattle, Washington

To: City of Seattle, Washington
From: Brian T. Grogan
Date: March 29, 2021
Re: Proposed Transfer of Controlling Interest of WaveDivision I, LLC

1. Background

On or about November 21, 2011 the City passed Ordinance 123741 approving the Assignment of a Cable Franchise to WaveDivision I, LLC, a Washington limited liability company (“Wave-I”). Wave-I maintained local management and operation of the cable system authorized under the franchise but underwent two changes to the controlling financial interests in the company. On or about September 4, 2012, the City passed Ordinance 123954 approving the transfer of the controlling interest in WaveDivision Holdings, LLC, parent company of WaveDivision I, LLC to Oak Hill Capital Partners III, L.P., Oak Hill Capital Management Partners III, L.P., and GI Wave Holdings LLC. Oak Hill Capital Partners and GI Partners are private equity firms. On or about September 24, 2012, the City passed Ordinance 124009 to make a technical adjustment to correct the named entities subject to the Consent Agreement, which is Attachment A to Ordinance 123954.

On September 12, 2017, the City passed Ordinance 125403 approving the renewed Cable Television Franchise Agreement with Wave-I. (the “Franchise”) At the same time Wave-I underwent another change to the controlling financial interests in the company. On October 5, 2017 the City passed Ordinance 125430 approving the transfer of controlling interest in Wave Holdco becoming a wholly-owned subsidiary of Radiate HoldCo and an indirect subsidiary on Radiate Holdings, L.P, a Delaware limited partnership.

Wave-I’s sole member and manager is WaveDivision Holdings, LLC, a Delaware limited liability company (“Wave Holdings”). Wave Holdings is wholly owned by OH WDH Holdco, LLC, a Delaware limited liability company which, in turn, is wholly owned by Wave Holdco, LLC, a Delaware limited liability company (“Wave Holdco”). Wave-I is the “Grantee” under the Franchise and Wave Holdings is the “Guarantor” under the Franchise. Section 14 of the Franchise and Subsection 21.60.110 of the Seattle Municipal Code (“SMC 21.60.110”) require the City’s advance written consent to any transfer of controlling interest of the Grantee or Guarantor under the Franchise.

2. Description of the Transaction

On October 31, 2021, an Agreement and Plan of Merger (the “Merger Agreement”) was entered into by and among Radiate Holdings, L.P., a Delaware limited partnership

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("Radiate"), certain affiliates of Radiate¹, Stonepeak Associates IV, LLC, a Delaware limited liability company ("Stonepeak IV") and certain affiliates of Stonepeak IV² and TPG VII Radiate Holding I, L.P., a Delaware limited partnership (solely in its capacity as the "Representative" as such term is defined in the Merger Agreement").

Pursuant to the Merger Agreement, the equity ownership in Radiate will be transferred to a different private equity firms, resulting in a transfer of the controlling interest of Radiate. There will be no changes to any of the subsidiaries of Radiate, including Wave Holdco and Wave I.

On or about November 30, 2020, Stonepeak IV and Radiate submitted FCC Form 394 Application for Franchise Authority Consent to Change of Control or Transfer of Control of Cable Television Franchise (the "Application") seeking the City's consent to the proposed transfer of a controlling interest. As a result, the City must process the Application in accordance with applicable federal laws and regulations and must issue a written determination approving or denying the proposed transfer of a controlling interest.

3. Franchise and City Code Requirements

Section 14 of the Franchise and SMC 21.60.110 provide that any proposed transfer or assignment of the Grantee under the Franchise requires the approval of the City. The transactions contemplated by the Merger Agreement constitute transfer of the Grantee as defined in SMC 21.60.110. SMC 21.60.110 provides that a transfer or assignment of the Franchise shall be deemed to occur if there is a sale or transfer of the Franchise, or sale, transfer, or fundamental corporate change of or in Grantee, including, but not limited to, a fundamental corporate change in Grantee's parent corporation or any entity having a controlling interest in Grantee, the sale of a controlling interest in Grantee's assets, a merger including the merger of a subsidiary and parent entity, consolidation or the creation of a subsidiary or affiliate entity, or a sale, transfer, exchange or assignment of stock in Grantee, or Grantee's parent corporation or any other entity having a controlling interest in Grantee, so as to create a new controlling interest. The transactions contemplated by the Purchase Agreement constitute a "transfer or assignment" of the Franchise under SMC 21.60.110.

For purposes of this Report, the transactions contemplated by the Merger Agreement shall hereinafter be referred to as a "Transfer of Controlling Interest." The recommendations contained herein relate to the proposed Transfer of Controlling Interest which includes the City's approval of the proposed assignment of the Franchise set forth in SMC 21.60.110.

4. Federal Law

¹ Radiate Holdings GP, LLC, TPG VII Radiate BL, LLC; TPG Wakeboard BL, LLC; Radiate GF II Blocker, LLC; Radiate OF II Blocker, LLC, and TPG VII Radiate Holdings I, L.P.

² Stonepeak Tiger Holdings I LLC, Stonepeak Tiger Holdings II Sub LLC, Stonepeak Tiger Blocker I LLC, Stonepeak Tiger Blocker II LLC, Stonepeak Tiger Blocker III LLC, Stonepeak Tiger Blocker IV LLC, Stonepeak Tiger GP Merger Sub LLC, and Stonepeak Tiger Partnership Merger Sub LP.

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The Cable Communications Policy Act of 1984, as amended by the Cable Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996 ("Cable Act"), provides at Section 617 (47 U.S.C. § 537):

Sales of Cable Systems. A franchising authority shall, if the franchise requires franchising authority approval of a sale or transfer, have 120 days to act upon any request for approval of such sale or transfer that contains or is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority. If the franchising authority fails to render a final decision on the request within 120 days, such request shall be deemed granted unless the requesting party and the franchising authority agree to an extension of time.

The Cable Act also provides at Section 613(d) (47 U.S.C. § 533(d)) as follows:

(d) Regulation of ownership by States or franchising authorities. Any State or franchising authority may not prohibit the ownership or control of a cable system by any person because of such person's ownership or control of any other media of mass communications or other media interests. Nothing in this section shall be construed to prevent any State or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person (1) because of such person's ownership or control of any other cable system in such jurisdiction, or (2) in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction.

Further, the Federal Communications Commission ("FCC") has promulgated regulations governing the sale of cable systems. Section 76.502 of the FCC's regulations (47 C.F.R. § 76.502) provides:

Time Limits Applicable to Franchise Authority Consideration of Transfer Applications.

- (a) A franchise authority shall have 120 days from the date of submission of a completed FCC Form 394, together with all exhibits, and any additional information required by the terms of the franchise agreement or applicable state or local law to act upon an application to sell, assign, or otherwise transfer controlling ownership of a cable system.*
- (b) A franchise authority that questions the accuracy of the information provided under paragraph (a) must notify the cable operator within 30 days of the filing of such information, or such information shall be deemed accepted, unless the cable operator has failed to provide any additional information reasonably requested by the franchise authority within 10 days of such request.*
- (c) If the franchise authority fails to act upon such transfer request within 120 days, such request shall be deemed granted unless the franchise authority and the requesting party otherwise agree to an extension of time.*

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5. Legal Standard of Review

The legal qualification standard relates primarily to the analysis of whether Wave-I, following completion of the proposed Transfer of Controlling Interest, will have the requisite authorization to operate and control the cable system and Franchise serving the City. The applicable standard of review is that the City's consent shall not be unreasonably withheld.

6. Legal Review

In this proposed Transfer of Controlling Interest Wave-I, will remain the "Grantee" under the Franchise. All of the membership interests in Wave-I will continue to be held by Wave Holdings which will continue to be an indirect wholly owned subsidiary of Wave Holdco. Wave Holdco will also continue to be an indirect wholly owned subsidiary of Radiate. What is changing is control of the equity interests in Radiate. In very basic terms, Stonepeak IV is acquiring indirectly an ownership interest in Radiate, which effectively results in the transfer of control of Wave-I.

Radiate Holdings, L.P. was formed on August 9, 2016 by the Secretary of the State of Delaware³. Wave Holdco, LLC was formed on June 3, 2014 by Delaware Secretary of State⁴. Following completion of the proposed Transfer of Controlling Interest, Radiate Holdings, L.P. will continue to own indirectly 100% of the equity interests in Wave Holdco. Radiate Holdings, L.P. will be owned by funds affiliated with Stonepeak IV through multiple intervening entities.

Based on the report prepared by Mr. Garth Ashpaugh, "Financial Review of Transfer of Franchise" we concur that the City would be prudent to require a guarantee of performance. Based on the information we have been provided, that company would be Radiate HoldCo, LLC or another entity higher in the corporate structure that would be in a position to make required capital investments as needed to ensure Franchise compliance.

Therefore the City's consent to the proposed Transfer of Controlling Interest should be conditioned on a guarantee from Radiate HoldCo, LLC or another entity acceptable to the City. This guaranty should require the guarantor to irrevocably and unconditionally guarantee the full and faithful performance by Wave-I of all of the terms, covenants, conditions and agreements contained in the Franchise.

7. Other Considerations

Another significant consideration in jurisdictions where more than one cable operator is authorized to provide cable television service is whether the transfer will result in the potential for a reduction in competition as a result of any sale or transfer of control. In particular, Section 613(d) (47 U.S.C. § 533(d)) of the Cable Act permits a franchising authority such as the City to prohibit the Transfer of Controlling Interest of the Cable System if the City determines that the acquisition of the Cable System may eliminate or

³ See attached online entity status from the Delaware Secretary of State for Radiate Holdings, L.P., Radiate TopCo, LLC and Radiate Holdco, LLC.

⁴ See attached online entity status from the Delaware Secretary of State for Wave Holdco, LLC, WaveDivision Holdings, LLC and OH WDH Holdco, LLC, and Certificate of Existence from the Washington Secretary of State for WaveDivision I, LLC.

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reduce competition in the delivery of cable service in such jurisdiction. Generally, this provision is of concern when one of the franchised cable operators seeks to acquire the competing system thereby reducing competition which may have an adverse impact on subscriber rates, programming and services. Given that Comcast and CenturyLink are also franchised cable operators in the City and neither Radiate, Wave-I, Wave Holdco, or Stonepeak IV are in any way owned or controlled by Comcast or CenturyLink, there is no immediate concern with reduced competition resulting from the proposed Transfer of Controlling Interest.

8. Recommendation

Based upon our review of the proposed Transfer of Controlling Interest described in the Application, we see no basis for the City to deny the Transfer of Controlling Interest based on a lack of legal qualifications of Radiate or Stonepeak IV. As set forth above, we further recommend that the City should obtain a guarantee from Radiate HoldCo, LLC or other entity acceptable to the City which will irrevocably and unconditionally guarantee the full and faithful performance by Wave-I of all of the terms, covenants, conditions and agreements contained in the Franchise.

~ END OF REPORT ~