

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
KAXT, LLC
(Assignor)
and
OTA Broadcasting (SFO), LLC
(Assignee)
For Consent to Assign the License of Station
KAXT-CD, San Francisco-San Jose, California
In re Application of
OTA Broadcasting (SFO), LLC
For Renewal of the License of
Television Broadcast Station KAXT-CD, San
Francisco- San Jose, California
File No BALDTA-20130211ACT
Facility ID No. 37689
File No. BRDTA-20140731ANH
Facility ID No. 37869

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 2015

Released: March 26, 2015

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. The Video Division ("Division") has before it a Petition for Reconsideration ("Reconsideration Petition"), and a related Petition to Hold Renewal Application in Abeyance ("Renewal Petition") filed by Ravi Kapur, Nalini Kapur, and Rishi Kapur (collectively, "Petitioners" or "Kapur"). Petitioners seek reconsideration of a decision granting an application to assign the license of station KAXT-CD, San Francisco-San Jose, California ("Station") from KAXT, LLC ("KAXT") to OTA Broadcasting (SFO), LLC ("OTA") ("Assignment Application"), and denying their petition to deny that application. Also before the Commission is OTA's application for renewal of the Station's license ("Renewal Application"). For the reasons set forth below, we deny the Reconsideration Petition, dismiss in part the Renewal Petition, and grant the Renewal Application. However, we admonish OTA for an apparent violation of section 1.17(a) of the Commission's rules.

1 KAXT, LLC (Assignor) and OTA Broadcasting (SFO), LLC (Assignee) for Consent to Assign the License of Station KAXT-CD, San Francisco-San Jose, California, Memorandum Opinion and Order, 29 FCC Rcd 8266 (Vid. Div. 2014) ("MO&O"). Petitioners had filed a Petition to Dismiss, Deny, or, in the Alternative, Hold Application in Abeyance ("Assignment Petition") the Assignment Application.

2 47 C.F.R. § 1.17(a).

II. BACKGROUND

2. *Petition for Reconsideration.* The gravamen of the Assignment Petition was that the application was invalidly signed because the majority owners of KAXT allegedly did not have the legal authority to enter into the Asset Purchase Agreement (“APA”) by which ownership of the station was assigned to OTA. This private dispute was the subject of arbitration while the Assignment Application was pending, and an arbitration decision was issued prior to action on the Assignment Application. The *MO&O* noted that an arbitrator determined that the APA was indeed validly signed.³ We restated the Commission’s policy not to adjudicate private contractual matters,⁴ and determined that there was no reason not to proceed with the review of the Assignment Application, especially in light of the arbitrator’s decision and subsequent California state court decision confirming the arbitrator’s holding.

3. The *MO&O* also denied the Kapurs’ allegation that OTA lacked the necessary character qualifications to purchase the Station. The Kapurs pointed to a letter they received from OTA’s counsel urging the Kapurs to withdraw the Petition in the wake of the arbitrator’s decision, and stating that OTA was prepared to pursue all available legal and equitable remedies against the Petitioners, including tortious interference and malicious prosecution.⁵ However, we held that all applicants may enforce their contractual rights by pursuing all available legal relief without impermissibly infringing upon petitioners’ rights, and that we were not persuaded that OTA’s correspondence discouraged access to the Commission or participation by the public.⁶ The *MO&O* cited *Fort Collins*, in which the Commission rejected a similar charge of harassment and held that an applicant’s advising a petitioner that it might file suit if it does not withdraw its petitions does not justify a determination that a licensee lacked the requisite character qualifications.⁷

4. In the Reconsideration Petition, Petitioners contend that we acted prematurely on the Application by granting the assignment prior to completion of the full appellate process.⁸ Second, the Reconsideration Petition argues that the *MO&O* made insupportable factual findings with regard to OTA’s allegedly harassing correspondence; and that the Petitioners’ supplemental allegations about the OTA threat were improperly treated as an informal objection rather than as a supplement to the Petition to Deny.⁹ Third, the Petitioners state that the parties to the Application have modified the APA to create an escrow account that would hold back more than 90 percent of the \$10.1 million purchase price, and condition dispersal of the funds on a final FCC order.¹⁰ The Reconsideration Petition asserts that OTA’s

³ *Id.* at 8269 (citing *Trumbly v. Kapur*, Phase 1 Award of Arbitrator, No. 74-140-00012-13 SM, American Arbitration Association at 15-16 (dated Sep. 17, 2013)) (“*Phase 1 Arbitration Award*”).

⁴ *Id.* at 8268 (citing *Arecibo Radio Corp.*, Memorandum Opinion and Order, 101 FCC 2d 545, 548 (1985); *John F. Runner, Receiver*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976) (local court of competent jurisdiction, not the FCC, is the proper forum to resolve private disputes)).

⁵ *Id.* (citing Assignment Application Informal Objection, Att. A, Letter from C. William Phillips, Counsel for OTA, to Randolph Gaw, Counsel for the Kapurs (dated Feb. 17, 2014) (“OTA Feb. 17, 2014 Letter”).

⁶ *Id.* at 8269-70.

⁷ *Fort Collins Broadcast Co., Inc.*, Memorandum Opinion and Order, 38 FCC 2d 707, 711-12 (1972) (“*Fort Collins*”).

⁸ Reconsideration Petition at 2-3.

⁹ Reconsideration Petition at 3-5.

¹⁰ Reconsideration Petition at 5-6.

failure to amend the Assignment Application with this escrow provision violates section 1.65 of the Commission's rules and raises a character qualifications issue.¹¹

5. Similarly, the Reconsideration Petition argues that OTA demonstrated a lack of candor in its response to Question 2.b of Section II of the Renewal Application. Specifically, the Petitioners argue that Question 2.b of Section II required a certification as to whether character issues have been raised in a pending broadcast application.¹² According to Petitioners, OTA falsely certified that no character issues had been raised, citing the allegations raised in the pending Assignment Application proceeding.

6. In its Opposition to the Reconsideration Petition, OTA responds that the Commission is not required to defer the exercise of its exclusive authority over license assignments until the conclusion of private civil litigation, and cites to Commission precedent that rejected requests to defer Commission action pending appeals of initial judicial decisions.¹³ OTA also argues that the Division properly concluded that OTA's correspondence did not raise an issue of character, and that the escrow agreement between OTA and KAXT was unremarkable and again does not raise any character concerns.¹⁴ In addition, OTA asserts that the creation of the escrow did not trigger the requirement to amend the Assignment Application under the Commission's rules because it is neither a substantial nor significant change under section 1.65(a), and that the Petitioners' character allegations did not compel any disclosure obligation in the license renewal application for the Station.¹⁵ OTA cites to Commission precedent that character allegations are not required to be disclosed as pending against an applicant until they are determined to have merit and are designated for hearing.¹⁶

7. In their Reply, Petitioners argue that the Commission precedent cited by the Opposition, holding that agency action will not be withheld pending the resolution of private disputes, is distinguishable here where the central concern is a licensing function – control of the licensee.¹⁷ Petitioners also restate their contention that the escrow agreement is a transparent attempt to discourage

¹¹ Reconsideration Petition at 6-7. Section 1.65(a) of the Commission's rules provides in pertinent part that "whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate." 47 C.F.R. § 1.65. An application is considered pending "from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court." *Id.*

¹² That provision of the Application states "Licensee certifies that [] neither the licensee nor any party to the application has or has had any interest in, or connection with: . . . b. any pending broadcast application in which character issues have been raised," to which the Application has certified "Yes."

¹³ Reconsideration Opposition at 2-6.

¹⁴ Reconsideration Opposition at 6-8.

¹⁵ Reconsideration Opposition at 8-9.

¹⁶ Reconsideration Opposition at 9 (citing *Greater Muskegon Broadcasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 15464, 15472 (1996) ("*Muskegon*"); *Coosa Valley News*, Letter Order, 23 FCC Rcd 9146, 9149 (MB Aud. Div. 2008)) ("*Coosa*").

¹⁷ Reconsideration Reply at 2-3.

the Petitioners' continued participation in this proceeding.¹⁸ Further, Petitioners argue that according to Video Division precedent, OTA's certification on the Renewal Application is false.¹⁹

8. *Renewal Application.* In the Renewal Petition, the Petitioners request that the renewal application for station KAXT-CD not be processed until final action on Petitioners' ongoing challenge to OTA's acquisition of the Station. The Petitioners state that they "have raised multiple issues [in the assignment proceeding] bearing on OTA's character qualifications to hold the [] license" and that "[t]he renewal context sheds additional light on these issues as they relate to the Assignment Application, and . . . [, therefore,] the Renewal Application should not be acted upon until these issues are finally resolved."²⁰ Specifically, they reiterate their claim that the certification in Question 2.b of Section II of the Renewal Application was false. OTA filed its Opposition to the Renewal Petition on December 3, 2014, arguing that the Renewal Petition is a classic bootstrap, and that the Petitioners should not be permitted to hold another application hostage on the basis of spurious contract claims and meritless character allegations. On December 23, 2014, the Petitioners filed their Renewal Reply, which did not raise new arguments.

III. DISCUSSION

A. Petition for Reconsideration

9. Petitions for reconsideration are appropriate where the petitioner demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters, or the Commission determines that consideration of the facts is required in the public interest.²¹ A petition for reconsideration that simply reiterates previously considered arguments will be denied.²² Arguments in a petition for reconsideration being raised for the first time will be considered only if they are based on changed circumstances or additional facts not known or existing at the time of petitioner's last opportunity to present such matters, or if consideration of such arguments is required to serve the public interest.²³ We find Petitioners' arguments for reconsideration to be reiterations of previously denied arguments or otherwise unpersuasive, and we therefore deny the Petition.

10. The Petitioners do not cite any precedent for their contention that the Commission is obligated to wait for all judicial processes to be exhausted before acting on an application to transfer control. Our grant of the application is permissive only, and the Applicants consummated with the risk that an appellate court may overturn the initial court decision. Our determination that it was appropriate to process the Application after the initial arbitrator's decision is consistent with *Radio Station WOW v. Johnson*, in which the Supreme Court held that the Commission has ultimate authority over licensing

¹⁸ Reconsideration Reply at 3-5.

¹⁹ Reconsideration Reply at 5-6 (citing *Nexstar Broadcasting, Inc. and Mission Broadcasting, Inc.*, Letter Order, 23 FCC Rcd 3529 (MB Vid. Div. 2008) ("*Nexstar Broadcasting*") (holding that the analogous Form 314 certifications must reflect character issues raised in pending petitions to deny in an applicant's license renewal proceedings).

²⁰ Renewal Petition at 2.

²¹ See 47 C.F.R. § 1.106(c); *Ernesto Bustos*, Memorandum Opinion and Order, 29 FCC Rcd 7311 (Vid. Div. 2014); *EZ Sacramento, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 18257, 18257 (EB 2000).

²² *Saga Communications of Illinois, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 5958, 5959 (MB 2011) ("*Saga*") (rejecting an argument from a petition for reconsideration because it did not raise any new information reflecting changed circumstances, did not present additional facts not know at the time of the last filing, and did not attempt to show anything more than a disagreement with the Commission's finding).

²³ 47 C.F.R. § 1.106(c).

matters, but that, where state and Commission interests conflict, attempts should be made to reconcile both interests.²⁴ Permission to transfer control is within the authority of the FCC. The *MO&O* cited to and relied solely upon the initial decision by the arbitrator to reach the conclusion that it was appropriate to proceed with review of the application as a discretionary matter of comity with the local arbitrator, and only cited to the court affirmance as further support for this conclusion.²⁵ The authority to sign is an issue of private contract law, however, and the ultimate determination of this controversy is not affected by our decision here.

11. With respect to the character allegations, we conclude that nothing in the Petition warrants reconsideration of the *MO&O*. First, the findings in the *MO&O* concerning the alleged harassing correspondence by OTA are supported by the record.²⁶ The Petition criticizes the decision for failing to “find” any facts, and for purportedly not citing or reviewing the specific threat language directed at the Petitioners.²⁷ The *MO&O* did indeed cite to and explain the nature of the correspondence from OTA’s counsel and assumed the truth of the allegations. Even assuming all the facts as alleged, the letter did not raise an issue as to whether grant of the application before us was *prima facie* inconsistent with the public interest.²⁸

12. Second, the Petitioners’ contention that that the Bureau must reconsider and reverse our conclusion that the OTA correspondence discourages access to the Commission or participation by the public has no merit. They attempt to re-argue the same assertion that they put forth in the initial Petition that the language in the correspondence constitutes intimidation, and cite no new case law or facts.²⁹ We deny this reiteration of a previously-considered argument.³⁰

13. Third, with respect to whether the supplemental allegations were treated as a separate informal objection or as part of the original petition to deny, the *MO&O* fully addressed the merits of the arguments in all pleadings filed, and the Petitioners received equitable treatment consistent with the Commission’s precedent. Regardless of whether that pleading was characterized as a supplement or an informal objection, the Petitioners’ assertion is therefore a distinction without a difference. Moreover, the Commission’s rules and the Petitioners’ own citations do not support its position that the supplemental pleading should be treated as anything other than an informal objection.³¹

²⁴ See, e.g., *Radio Station WOW v. Johnson*, 326 U.S. 120, 131 (1945). See also *Kirk Merkley, Receiver*, Memorandum Opinion and Order, 94 FCC 2d 829, 837-838 (1983); *Arecibo Radio Corp.*, Memorandum Opinion and Order, 101 FCC 2d 545 (1985) and *TV Active, LLC*, Order on Reconsideration, 16 FC Rcd 18938, 18944 (2001).

²⁵ *MO&O* at 8269 (“The Arbitrator’s declaration that the APA was validly signed and enforceable, which decision has been confirmed by a state court, moots the Petitioners’ primary allegation.”).

²⁶ Reconsideration Petition at 3-5.

²⁷ Reconsideration Petition at 4.

²⁸ *MO&O* at para. 8 (citing *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987); *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985)). See, e.g., *Application of Board of Trustees, Coast Community College District*, Memorandum Opinion and Order, 11 FCC Rcd 5303, 5303 (1996) (“In determining whether a petitioner has made a *prima facie* case, we must assume the truth of the petition’s allegations without looking beyond the petition and the evidence it cites.”) (citing *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988)).

²⁹ Reconsideration Petition at 4-5.

³⁰ *Saga*, 26 FCC Rcd at 5959.

³¹ The Petition argues that Commission case law allows for supplements to be filed in circumstances where events transpired beyond the 30-day window after public notice of the acceptance of an application, and it would otherwise be impossible to raise allegations within that timeframe. Reconsideration Petition at 3-4 (citing *Schroeder Manatee*

14. We disagree with the Petitioners that the side letter between OTA and KAXT which created a “holdback” escrow account until completion of the Commission appeal process constitutes an impermissible strong-arm tactic.³² Where the Petitioners take the position that the transaction should never have been allowed to take place, the amendment of the APA so that OTA can protect itself against a disbursement that may need to be unwound is not inappropriate. In addition, the Petitioners’ assertion that OTA is attempting to coerce Petitioners to abandon their pursuit of further appeals by conditioning funds dispersal on a final order is undercut by their claim that Petitioners were “deliberately kept in the dark” about the escrow until they learned of it in litigation.³³ Presumably, had OTA intended to coerce the Petitioners, OTA would have brandished the creation of the escrow account on or soon after August 11, 2014, rather than waiting weeks before disclosing it to the Petitioners as part of the California litigation; an intentionally undisclosed agreement cannot be used to bully or intimidate.

15. We further find that OTA had no obligation to amend the application to include the escrow agreement as the application remained substantially accurate. The transaction had already closed and the existence of the escrow agreement did not change the purchase price of the station, only the manner in which it was to be distributed. Though we encourage all applicants to provide as thorough a description of the proposed transaction as possible, we do not believe the existence of the escrow agreement was of decisional significance in this case.

B. Renewal Application

16. We dismiss in part the Renewal Petition. The Petitioners ask that the Renewal Application be held in abeyance until final action has been taken on their challenge, and cite to their Petition for Reconsideration.³⁴ Today’s denial of the Petition for Reconsideration constitutes such action. With the exception of the character certification contained in the renewal application, our action on the Reconsideration Petition addresses the Renewal Petition’s character allegations. Below, we address the incomplete character certification contained in the Renewal Application. We do find that OTA failed to update its Renewal Application as required by section 1.65 and 1.17(a) of the Commission’s rules. Question 2b of Section II of the Renewal Application requires the licensee to certify that it has not “had any interest in, or connection with . . . any pending broadcast application in which character issues have been raised.” Since the Commission’s rules consider the Assignment Application to be pending until the *MO&O* is no longer subject to reconsideration or court review,³⁵ the filing of the Renewal Application on July 31, 2014 with an affirmative response to this question is incorrect. Section 1.17(a)(2) of the Commission’s rules prohibits a licensee in an adjudicatory proceeding from providing material

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Ranch, Order, 15 FCC Rcd. 10060 (WTB 2000); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Columbus and Monona, Wisconsin)*, Memorandum Opinion and Order, 21 FCC Rcd 10012 (2006)). The cases cited rely upon section 1.106(f) of the Commission’s rules, 47 C.F.R. § 1.106(f), which does expressly provide for leave to grant supplemental pleadings to petitions for reconsideration, but which section does not directly address petitions to deny. In contrast, section 73.3587 of the rules governs the treatment of pleadings and other filings not meeting the strict requirements of a petition to deny. 47 C.F.R. § 73.3587.

³² See Reconsideration Petition at 6 (citing Reconsideration Petition, Att. B, Letter from William Tolpegin, President and CEO, OTA, to Warren Trumbly, KAXT (dated Jul. 11, 2014)).

³³ Petition at 6 & n.9.

³⁴ Renewal Petition at 1.

³⁵ 47 C.F.R. § 1.65(a) (defining an application as “pending” before the Commission for the purposes of that section to be “from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court”).

information that is incorrect without a reasonable basis for believing that such information is not incorrect or misleading.³⁶

17. We agree with the Petitioners that the Renewal Application should have disclosed the character issues raised in the pending Assignment Application,³⁷ and we expect a greater degree of thoroughness in representations made to the Commission. However, based on a review of the record as a whole, we do not find that there exists a substantial and material question of fact concerning OTA's character qualifications. As we stated in *Nexstar Broadcasting*, “[a] mistake in an application alone, without any indication that the licensee meant to deceive the Commission, does not raise a substantial and material question of fact regarding intentional misrepresentation,” and that the Commission “will not infer intent to deceive merely because an applicant submits false statements in an application upon which it wants favorable action.”³⁸ While our denial of the Assignment Petition does not justify the failure to disclose the pending proceeding in the Renewal Application, it is a factor in determining the appropriate sanction under section 503(b)(2)(D) of the Act.³⁹ We do not rule out more severe sanctions for a similar violation of this nature in the future, but we have determined that an admonishment is appropriate at this time. We, therefore, ADMONISH OTA for a violation of section 1.17(a) of the Commission's rules.

18. We cannot conclude that such a violation here constitutes a “serious” violation or otherwise indicates a “pattern of abuse” such that grant of the renewal application would be inconsistent with section 309(k) of the Act, as alleged by the Petitioners.⁴⁰ Rather, OTA appears to be legitimately confused as to whether it needed to disclose the Assignment Petition under its reading of staff precedent. While we would encourage applicants to “err on the side of caution” in their disclosures, we do not see a “flouting” of our rules, as alleged by the Petitioners. Having reviewed the application before us and all facts at issue, we find that grant of the license renewal application would be in the public interest.

IV. ORDERING CLAUSES

19. Accordingly, for the reasons discussed above, IT IS ORDERED, That the Petition for Reconsideration filed by Ravi Kapur, Nalini Kapur, and Rishi Kapur IS DENIED.

20. IT IS FURTHER ORDERED That the Petition to Hold Renewal Application in Abeyance filed on November 3, 2014 is DISMISSED IN PART.

³⁶ 47 C.F.R. § 1.17(a)(2).

³⁷ See *Nexstar Broadcasting*, 23 FCC Rcd at 3537.

³⁸ *Id.* See also *Hispanic Broadcasting Corporation*, Memorandum Opinion and Order, 16 FCC Rcd 8072, 8074 (2001); *Joseph W. Bollinger and Donna M. Bollinger*, Memorandum Opinion and Order, 16 FCC Rcd 18107 (2001).

³⁹ 47 U.S.C. § 503(b)(2)(D) (“In determining the amount of such a forfeiture penalty, the Commission . . . shall take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”). In this case, OTA cited *Muskegon* and *Coosa* for the proposition that character allegations need not be disclosed as pending until they “are determined to have merit and are designated for hearing.” *Muskegon*, 11 FCC Rcd at 15472.

⁴⁰ 47 U.S.C. § 309(k).

21. IT IS FURTHER ORDERED That the Application for Renewal of Station License KAXT-CD filed on July 31, 2014 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

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Chief, Video Division
Media Bureau