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In re: **KTRU(FM), Houston, Texas**
Facility ID No. 72685
File No. BALED-20101029ACX

K218DA, Houston, Texas
Facility ID No. 93168
File No. BALFT-20101029ACY

Applications for Assignment of License
Petition to Deny and Informal Objection

Dear Counsel, Ms. Greenberg, Ms. Bush, and Mr. McGuinness:

We have before us the above-captioned applications ("Applications") seeking approval for the proposed assignment of license for noncommercial educational ("NCE") Station KTRU(FM), Houston, Texas and FM Translator Station K218DA, Houston, Texas (the "Stations"), from William Marsh Rice University ("Rice") to University of Houston System ("UHS"). On December 3, 2010, Friends of KTRU ("Petitioners") filed a Petition to Deny ("Petition").[1] Three station listeners ("Objectors") submitted letters opposing the proposed transaction ("Informal Objections").[2] For the reasons stated below, we deny the Petition and Informal Objections, and grant the Applications.

Background. Petitioners oppose grant of the Applications, arguing that the proposed assignment of licenses is not in the public interest and that Rice and UHS have otherwise violated the Commission's rules and state law. Specifically, Petitioners allege that: (1) The assignment will involve a format change that contradicts the Commission's policies in favor of broadcast localism; (2) the assignment undermines the educational purpose of an NCE station and UHS' proposed programming description is inadequate; (3) the assignment will result in a concentration of NCE FM licenses in the hands of UHS; (4) the UHS public file is missing a required ownership report for one of its existing NCE broadcast stations; (5) the negotiations between UHS and Rice violated the Texas Open Meetings Act; and (6) the agreed purchase price is deflated and harms the public interest. The Informal Objections reiterate the claims raised by Petitioners.

Discussion. Section 310(d) of the Communications Act of 1934, as amended (the "Act"),[3] requires the Commission to make a determination 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,[4] 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 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.[5] This threshold determination is made by evaluating the petition and the supporting affidavits. Second, 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

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[1] UHS filed an Opposition to the Petition to Deny ("UHS Opposition") on December 13, 2010, and Rice also filed an Opposition to the Petition to Deny ("Rice Opposition") on December 13, 2010. Petitioners filed a consolidated Reply on December 20, 2010.

[2] Janet Greenberg's objection is styled as a "Request for Rejection of Assignment of Broadcast License." The objection fails to meet the requirements of a petition to deny because it was late-filed and failed to provide sworn statements supporting factual allegations. *See* 47 U.S.C. § 309(d). We will treat it, however, as an informal objection pursuant to Section 73.3587 of the Commission's rules. *See* 47 C.F.R. § 73.3587. Station listeners Karen Bush and William McGuinness, IV also filed Informal Objections pursuant to Section 73.3587 of the Commission's rules. Their objections were in the form of letters to Senator Kay Bailey Hutchison, who then forwarded the letters to the Commission. The letters were then served on the parties and placed in the record pursuant to Sections 1.1214(d) and (e) of the Commission's rules. 47 C.F.R. § 1.1214(d), (e).

[3] 47 U.S.C. § 310(d).

[4] 47 U.S.C. § 309(d)(1).

[5] *See id.*; *Astroline Communications Co. v. FCC,* 857 F.2d 1556, 1561 (D.C. Cir. 1988).

hearing.[6] 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.

Format Change and Broadcast Localism. Petitioners oppose the Station's format change from alternative music formats to classical music and fine arts programming.[7] They contend that the change in format contravenes the Commission's policies promoting broadcast localism and ask the Commission to deny the Applications to preserve the Station's alternative music and local programming format.[8] Although the Commission recognizes that the Stations' program format has attracted a devoted listenership, it is well-settled policy that the Commission does not scrutinize or regulate programming, nor does it take potential changes in programming formats into consideration in reviewing assignment applications. In 1976, the Commission issued a Policy Statement in which it concluded that review of program formats was not required by the Act, would not benefit the public, would deter innovation, and would impose substantial administrative burdens on the Commission.[9] The Supreme Court of the United States has upheld this policy.[10] In doing so, the Court accepted the Commission's findings that "the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters . . . " and that a change in programming is not a material factor that should be considered by the Commission in ruling on applications for license transfer.[11] This is particularly so with regard to the programming decisions of NCE broadcast stations, based on the Commission's historically "limited role of facilitating the development of the public broadcasting system rather than determining the content of its programming."[12]

Additionally, assignees need no longer file a specific program service proposal with an assignment application.[13] The primary reason for Commission review of assignment applications is to consider the legal qualifications of the parties.[14] The sufficiency of an applicant's programming is not

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[6] 47 U.S.C. § 309(d)(2).

[7] *See* Petition at 7-14.

[8] *Id.* Petitioners rely on a Notice of Proposed Rulemaking ("NPRM") in support of their argument that the format change contravenes Commission policies promoting broadcast localism. *Id. citing Broadcast Localism*, Report on Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1234 (2008). An NPRM does not serve as legal precedent and therefore provides no support for Petitioners' argument. Petitioners also cite *Allentown Broadcasting* and *Utica Observer-Dispatch*. *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (1955); *Utica Observer-Dispatch, Inc.*, 11 FCC 383, 391-92 (1946). Both cases are distinguishable because they apply communities that have no other source of radio signals transmitting local content.

[9] *See Changes in the Entertainment Formats of Broadcast Stations,* Memorandum Opinion and Order, 60 FCC 2d 858, 865-66 (1976), *recon. denied*, Memorandum Opinion and Order, 66 FCC 2d 78 (1977), *rev'd sub nom. WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979), *rev'd*, 450 U.S. 582 (1981).

[10] *FCC v. WNCN Listener's Guild*, 450 U.S. 582 (1981).

[11] *Id.* at 585.

[12] *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees,* Notice of Proposed Rule Making, 87 FCC 2d 716, 732 (1981). *See also License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania,* Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993) (licensees have broad discretion over programming decisions).

[13] FCC Form 314.

[14] *In the Matter of Request for Declaratory Ruling Concerning Programming Information in Broadcast Applications for Construction Permits, Transfers and Assignments*, Memorandum Opinion and Order, 3 FCC Rcd 5467 (1988).

generally considered in the assignment context, but rather in renewal proceedings.[15] Accordingly, we find that Petitioners have failed to raise a substantial and material question of fact warranting further inquiry regarding these matters.

Educational Benefits and Program Description. Petitioners argue that UHS will not provide the same broadcast-related educational benefits to students as Rice has previously offered, undermining the educational purpose of the NCE station.[16] In addition, Petitioners contend that UHS' description of the programming it intends to provide is inadequate and should be rejected.[17]

Section 73.503 of the Commission's Rules provides that NCE FM broadcast stations may be licensed to nonprofit educational institutions upon a showing that the station will be used for the advancement of an educational program.[18] Assignees must meet the same standard as an applicant seeking to obtain a new NCE license.[19] Form 340, the application for an NCE broadcast station construction permit, asks the applicant to certify that the Commission has previously granted a broadcast application that found the applicant qualified as an NCE entity with a qualifying educational program, and that the applicant will use the proposed station to advance a program similar to that which the Commission has found qualifying in the previous application.[20] If the applicant can certify it has already been approved as an NCE entity and will advance a similar program, no further action is required.[21]

UHS already operates an NCE station and intends to use the proposed station to advance a similar program. In Exhibit 11 to the Application, UHS included a portion of the FCC Form 340 NCE broadcast station construction permit application in which UHS certified that it is a nonprofit educational institution and that the Commission has previously granted a broadcast application that found UHS qualified as an NCE entity with a qualifying educational program.[22] UHS is not required to provide any further exhibit proving its qualifications to hold an NCE license or describing its intended programming. Accordingly, we find that Petitioners have failed to raise a substantial and material question of fact warranting further inquiry regarding these matters.

Concentration of NCE FM Licenses. Petitioners argue that allowing UHS to operate two of the five NCE FM stations in the Houston market would increase consolidation in the market, harming the public interest.[23] However, as Petitioners admit, the Commission's local radio ownership limits do not apply to NCE FM stations.[24] Petitioners have not provided any basis for the Commission to engage in an analysis of the effects of UHS's acquisition of KTRU(FM) on competition in the NCE market in Houston,

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[15] *Nassau Community College*, Memorandum Opinion and Order, 12 FCC Rcd 12234, 12236 n.6 (1997).

[16] Petition at 15-18.

[17] Petition at 25.

[18] 47 C.F.R. § 73.503.

[19] 47 U.S.C. § 310(d); FCC Form 314, Section III, Item 2.

[20] FCC Form 340, Section II, Question 4(a).

[21] FCC Form 340, Section II, Question 4(b).

[22] Application, Exhibit 11.

[23] Petition at 21.

[24] Petition at 21, *citing* 47 C.F.R. 73.3555(f).

TX. Accordingly, we find that Petitioners have failed to raise a substantial and material question of fact warranting further inquiry on this matter.

Missing Ownership Reports. Petitioners claim that UHS has failed to properly maintain the public inspection file for its existing NCE station, KUHF.[25] They state that the KUHF public file contained only the station's 2005 ownership report and was missing the three subsequent FCC ownership reports.[26] The affidavit to which Petitioners cite in support of this contention makes no reference to any missing ownership report.[27] However, UHS admits that the KUHF public inspection file did not contain the most recent ownership reports.[28]

Public file violations, on their own, do not establish grounds for denial of an application unless intentional misconduct is evident.[29] Petitioners make no allegations of intentional misconduct. Therefore, we find that Petitioners have failed to raise a substantial and material question of fact warranting further inquiry on this matter with respect to the proposed Rice/UHS transaction. We will, however, refer the KUHF public inspection file matter to the Enforcement Bureau for consideration.[30]

Texas Open Meetings Act. Petitioners allege that UHS and Rice may not have met their obligations under the Texas Open Meetings Act,[31] which requires that state governmental bodies, including UHS,[32] provide the public with advance written notice of the date, hour, and place of each regular, special, or called meeting.[33] The Texas Open Meetings Act also requires a full disclosure of the subject matter of the meetings.[34]

The Commission does not have the responsibility, authority, or resources to investigate or punish alleged violations of state law.[35] Moreover, the Commission generally only considers three types of

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[25] Petition at 28.

[26] *Id.*

[27] *See* Declaration of Nicholas Schlossman (attached to Petition as Exhibit M).

[28] UHS Opposition at 11.

[29] *Millard V. Oakley*, Memorandum Opinion and Order, 45 RR 2d 661 (1979) (explaining that even if a claim of a public file violation were true, a licensee would not be disqualified without a showing of intentional misconduct); *3 Daughters Media, Inc.*, Letter, 22 FCC Rcd 9047, 9051 (2007) ("Public file violations only implicate the Commission's Character Qualifications Policy when extensive and egregious or when indicative of substantial carelessness"); *Discussion Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 7433, 7439 (2004) (noting that a determination by the Commission's Enforcement Bureau of a public file violation did not call for the denial of the application or the designation of the application for a hearing).

[30] *See, e.g., Connecticut Radio Fellowship, Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 3299 (EB 2010).

[31] Tex. Rev. Stat. Ann. Art. 6252-17.

[32] The UHS Board of Regents is appointed by the Governor of Texas and approved by the state Senate. *See* Petition at 31.

[33] Petition at 31-32.

[34] *Id.*

[35] *WGBH Educational Foundation*, Memorandum Opinion and Order, 43 RR 2d 1436, 69 FCC 2d 1250, 1253 (1978). The Petitioners have merely raised bare allegations of state law violations and have submitted no

adjudicated non-FCC misconduct which are not specifically proscribed by the Act or Rules: (1) fraudulent statements to government agencies; (2) felony convictions; and (3) mass media related violations of anti-competitive and antitrust statutes.[36] Because the claims raised by Petitioners do not fall into one of these enumerated categories, under our current policy, we would not consider Petitioners' claims even if adjudicated. Therefore, we find that Petitioners have failed to raise a substantial and material question of fact warranting further inquiry on this matter.

Purchase Price. Petitioners argue that Rice agreed to sell the Station to UHS at a deflated price which harms the public interest.[37] The Commission does not examine the purchase price in a station sale unless it appears from other facts that the arrangement may not have been an arm's length transaction between the parties.[38] Petitioners make no allegations that the transaction was conducted at anything less than arm's length. Rice asserts that the transaction took place following a standard confidential auction process and received a purchase price within the range of what its professional advisors suggest at the outset would be reasonable.[39] Therefore, the alleged sale of the Station at a deflated price does not present a substantial and material question of fact calling for further inquiry on this matter.

Conclusion/Actions. We find that neither the Petitioners nor the Objectors have raised a substantial and material question of fact warranting further inquiry. We further find that grant of the Applications is consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED, that the Petition to Deny filed by Friends of KTRU IS DENIED, the Informal Objections submitted by Janet Greenberg, Karen Bush, and William McGuinness, IV ARE DENIED, and that the applications for approval to assign the license for NCE Station KTRU(FM), Houston, Texas (BALED-20101029ACX) and FM Translator Station K218DA, Houston, Texas (File No. BALFT-20101029ACY) from William Marsh Rice University to University of Houston System ARE GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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information that the appropriate Texas law enforcement authorities have shown any interest in investigating or prosecuting Rice or UHS for a violation of state law.

[36] *See Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252, 3252-53 (1990), *modified*, 6 FCC Rcd 3448 (1991), and 7 FCC Rcd 6564 (1992).

[37] Petition at 34.

[38] *Applications for Assignment of License/Transfer of Control of Television Stations WTTE(TV), WNUV(TV), and WTAT(TV),* Letter, 19 FCC Rcd 3897 (2004).

[39] Rice Opposition at 9.