

STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of)

KAXT, LLC)
Assignor)

OTA Broadcasting (SFO), LLC)
Assignee)

For Assignment of the License of)
Television Broadcast Station KAXT-CD)

) File No. BALDTA-20130211ACT
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FILED/ACCEPTED

APR - 1 2013

Federal Communications Commission
Office of the Secretary

To: Marlene H. Dortch
Secretary of the Commission

ATTN: Chief, Media Bureau

**OPPOSITION TO
PETITION TO DISMISS, DENY, OR, IN THE
ALTERNATIVE, HOLD APPLICATION IN ABEYANCE**

OTA Broadcasting (SFO), LLC (“OTA” or “Assignee”), by its attorneys, hereby files its opposition to the Petition to Dismiss, Deny, or, in the Alternative, Hold in Abeyance dated March 18, 2013 (“Petition”) filed by Ravi Kapur, Nalini Kapur, and Rishi Kapur (collectively, “Petitioners”). The Petition was filed against the above-captioned FCC Form 314 application (the “Assignment Application”) that seeks Federal Communications Commission (“FCC” or “Commission”) consent to the assignment of the license of Class A television broadcast station KAXT-CD, San Francisco-San Jose, California (the “Station”) from KAXT, LLC (“Assignor”) to OTA. The sole issue raised in the Petition is the relevance of a private contractual dispute being litigated before other tribunals concerning the authority of Warren Trumbly to execute the Assignment Application on behalf of KAXT, LLC, the Assignor (Mr. Trumbly has executed numerous other FCC applications and filings on behalf of KAXT, LLC since 2006). As

discussed below, the FCC has long recognized that it is not the proper forum for resolving private disputes arising under state law. Moreover, for decades the Commission consistently has refused to delay grant of an assignment application based on the existence of pending litigation before state tribunals¹. The Commission should follow its longstanding policies in this case and promptly dismiss the Petition and grant the Assignment Application.

I. THE PETITIONERS HAVE NOT MET THEIR BURDEN

Section 309(d) of the Communications Act of 1934, as amended, requires that a petition to deny must provide “specific allegations of fact,” supported by affidavit, that are “sufficient to show that ... a grant of the application would be *prima facie* inconsistent” with the public interest. 47 U.S.C. § 309(d)(1).² The Petitioners have not met their burden. The Petition

¹ For example, in a 1984 case, the Commission affirmed a Mass Media Bureau decision refusing to defer action on an assignment application despite the pendency of litigation based upon a contractual ownership dispute. The Bureau had held that the dispute was “best left to the courts for resolution” and that “since no injunction had been issued enjoining the assignment” of the station in question, “the Commission would not defer action on the assignment application.” *Gulf Coast Broadcasting Co. (Assignor) and Burke Broadcasting Co. of Laredo (Assignee)*, 1984 FCC LEXIS 2472 (June 22, 1984) ¶ 2.

² If a petitioner meets the threshold *prima facie* showing, the Commission will consider whether, based on the totality of the evidence, a “substantial and material question of fact” exists regarding whether grant of the application would be inconsistent with the public interest. 47 U.S.C. § 309(d)(1) and (2); *see also Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988); *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998). The U.S. Court of Appeals for the D.C. Circuit has ruled that in order to establish a *prima facie* showing, a petitioner’s allegations must consist of “specific evidentiary facts, ‘not ultimate conclusory facts or mere general allegations.’” *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980) (*en banc*) quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-34 (D.C. Cir. 1974)). With respect to the second prong of the analysis, the D.C. Circuit has stated, “a substantial and material question [of fact] is raised when ‘the totality of the evidence’ arouses a sufficient doubt on the [question whether grant of the application would serve the public interest] that further inquiry is called for.” *Serafyn*, 149 F.3d at 1216 (quoting *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985)).

includes no allegations of fact that grant of the Assignment Application would be inconsistent with the public interest. No credible objections have been raised to the qualifications of OTA to be the assignee of KAXT-CD or of KAXT, LLC to be the assignor.³ Additionally, because the Assignment Application satisfies all FCC rules governing “execution” and “other matters of a formal character,” the Commission should follow its precedent and grant the Assignment Application.

A. The Commission Should Follow Its Settled Policy of Leaving Questions of State Law to Local Tribunals

Two different Commission policies govern here. One policy is that the Commission leaves the resolution of local law questions to local tribunals with jurisdiction over those questions.⁴ “[T]he Commission ... defers to judicial determinations regarding the interpretation and enforceability of contracts for the sale of broadcast stations.”⁵ Thus, the Petitioners’ claim that “the FCC must be careful not to ally itself with any party in the Arbitration that Trumbly initiated” is without merit.⁶ Action on the pending Assignment Application will have no such

³ The FCC previously approved an assignment application where OTA was the assignee. See KTLN-TV, Novato, California (BALCDT-20110606AAZ). Since January 2012, the FCC has granted multiple other assignment applications to affiliates of OTA: KVOS-TV, Bellingham, Washington (BALCDT-20111201LNO); WEBR-CD, New York, New York (BALDTA-20120313AAL); KUGB-CD, Houston, Texas (BALDTA-20121120ACG); WLWC(TV), New Bedford, Massachusetts (BALCDT-20130110AFI); and WYCN-LP, Nashua, New Hampshire (BALTVA-20130114 ABF). Petitioners’ claim that grant of the Assignment Application “would make the FCC complicit in an unauthorized license assignment” is a non-sequitur, as only the FCC can authorize a license assignment. Petition at 7 n.8.

⁴ *Listener’s Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (approving “the Commission’s longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts”).

⁵ *GAF Broadcasting Co.*, 58 R.R.2d 69, 70 ¶ 5 (1985).

⁶ Petition at 7. Equally meritless is Petitioners’ claim at 8 that the FCC “should protect itself from having to rescind grant of the Application.” The Communications Act vests the FCC with

effect. The whole point of the Commission's policy of deferral of private contractual disputes is that it does not alter *in any way* the parties' rights and obligations under state law:

[G]rant of [a transfer or assignment] application indicates only that the application complies with our rules and policies and that the parties are qualified as licensees of the Commission. It does not alter in any way the parties' rights or obligations under state law.⁷

Moreover, Commission consent to the Application is permissive rather than compulsory and does not, therefore, prejudice the parties' rights. If the parties close on the transaction, they do so at their own risk, and remain subject to the determination of the state tribunal as to their rights and obligations.⁸

B. The Commission Also Should Follow Its Settled Policy of Not Delaying Action on Assignment Applications While Contractual Disputes Are Resolved Elsewhere

A second and different policy is that the Commission does *not* delay performing its responsibilities to act on applications pending the outcome of local proceedings. The Commission's policy not to defer action pending resolution of contractual disputes serves the public interest because the Commission cannot control the duration of other proceedings, which could take years before appeals are resolved and finality is achieved.

the requisite authority to take whatever actions are deemed necessary to fulfill its statutory duties.

⁷ See Letter from Barbara A. Kreisman, Chief, Video Division, FCC Media Bureau, to Ray Webb, *et al.*, 20 FCC Rcd 17997, 17999 (MB 2005) (rejecting Petition to Deny requesting that the FCC defer action on transfer of control application based on pending litigation concerning the ownership of corporate shares under state law) ("*FCC 2005 Webb Decision*"). See also *Choate, Hall and Stewart*, 51 RR 2d 261, 262 (1982) ("a Commission grant merely authorizes the parties to proceed with the transaction and does not prejudice any relief the parties ultimately may be entitled to under the civil suit").

⁸ *FCC 2005 Webb Decision* at 17999. Accord *Chief Washakie TV (Assignor) and Hi Ho Broadcasting Corp. of Wyoming (Assignee)*, 46 RR 2d 1594, 1598 n.7 (1980); *Sonderling Broadcasting Co. (Assignor) and WOL, Inc. (Assignee)*, 46 RR 2d 890, 894-95 (1980).

It is well established under Commission precedent that the Commission is not the proper forum for resolving private contractual disputes, *and* that the Commission will *not* defer action on pending transfer applications pending state court resolution of contractual disputes.⁹ (Emphasis added).

The FCC should follow its consistent policy here also.

C. Contrary to the Petitioners' Claims, FCC Precedent Holds That, Where An Application Otherwise Grantable Is Executed, the FCC Will Not Delay Grant Pending the Resolution of Private Contractual Disputes Before Other Tribunals

Petitioners say they “strongly believe” they will establish in the litigation before local tribunals that Trumbly lacked authority to execute either the underlying asset purchase agreement or the Assignment Application.¹⁰ Although Petitioners claim that they are not asking the FCC to engage in the redundant and potentially counterproductive exercise of attempting to adjudicate the issues now being litigated before other tribunals, they append to their Petition over one hundred pages of documents relating to the pending litigation and ask the FCC to provide them “relief.”¹¹ The FCC, however, should follow precedent that it will not defer grant of a complete assignment application based on a pending private dispute over the signatory’s authority.

Specifically, a 2009 FCC case involving the assignment of a broadband PCS license is directly analogous to the instant situation and should be followed. There, a person filed a

⁹ See *Margaret Jackson (Transferor) and Ray Webb, et al. (Transferees)*, 18 FCC Rcd 26403 (2003) (denying request to defer action on transfer of control application based on pending litigation in California state court concerning the transferability of corporate shares under state law); *Decatur Telecasting, Inc.*, 7 FCC Rcd 8622, 8624 (MMB 1992).

¹⁰ Petition at 5.

¹¹ *Id.* Although the Petitioners rely mainly on procedural arguments, they also speculate at 7-8, without any substantiation whatsoever, that OTA will change the station’s programming formats. In any event, the Supreme Court has upheld the FCC’s policy not to consider programming format changes in evaluating assignment applications. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593-95 (1981).

petition to deny an assignment application claiming that Mr. Patel, the listed signatory of the application, “lacked the authority to assign the license.”¹² The Mobility Division of the Wireless Telecommunications Bureau granted the assignment application over the objection. On review, the Acting Chief of the Wireless Telecommunications Bureau affirmed the grant of the assignment over the challenge concerning the signatory’s authority:

The issue of whether Mr. Patel’s actions were within the scope of his employment is outside the Commission’s jurisdiction and is more appropriate for a court of competent jurisdiction. Moreover, whether a particular individual had corporate authority to sign an assignment application is a contractual matter, a dispute over which is ordinarily addressed by the courts rather than by the Commission. Since this is a disputed issue being litigated in state court proceedings . . . it is not necessary to our evaluation of whether the assignment is in the public interest.¹³

In contrast to the assignment case described above that has a fact pattern similar to the instant case, Petitioners rely on two FCC decisions, both of which are distinguishable on their facts. Unlike in the instant case, in the decisions cited by Petitioners there was *no* signature whatsoever on the appropriate assignment/transfer application form.

In the 1972 *Peace Broadcasting Corp.* case,¹⁴ the proposed transferor did not sign the paper application as required by the then-applicable FCC rule and requested a waiver. The Commission dismissed the transfer application because “the application is defective unless signed.”¹⁵ In the instant case, however, Mr. Trumbly did include his electronic signature on the application; no waiver was requested nor is needed.

¹² *Application of ComScape Communications, Inc. and East Kentucky Network, LLC*, 24 FCC Rcd 8645, 8645 (WTB 2009).

¹³ *Id.* at 8647-48 (footnotes omitted)

¹⁴ See Petition at 5, *citing Peace Broadcasting Corp.*, 36 FCC 2d 675 (1972).

¹⁵ *Id.* at 676.

The second case cited by Petitioners also is not on point. In 2012, the FCC staff dismissed applications by Liberty Media to transfer *de facto* control of Sirius XM Radio Inc. The applications were filed on the electronic form for special temporary authority because Sirius would not provide Liberty Media with its passwords, signatures and other information required to file an electronic transfer of control application. The FCC staff found Liberty Media's transfer applications to be unacceptable for filing because they were defective with respect to "execution" and "other matters of a formal character."¹⁶ No similar finding could be made in the instant case. The Assignment Application satisfies all FCC rules governing "execution" and "other matters of a formal character." In contrast to the Liberty Media case, the Assignment Application here was filed on the appropriate electronic form and executed by Mr. Trumbly using the passwords and signatures needed to file a complete assignment application. Indeed, Mr. Trumbly was the signatory for numerous other CDBS electronic filings/applications filed by KAXT, LLC since 2006.

As the two cases cited by Petitioners are not on point, the Commission should follow its longstanding policies of: 1) deferring to judicial determinations regarding the interpretation and enforceability of contracts; and 2) refusing to delay or withhold action in assignment and transfer proceedings pending local determinations.

II. CONCLUSION

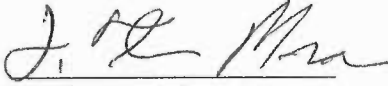
The sole issue before the Commission is whether grant of the Assignment Application is in the public interest, convenience and necessity. The Petitioners have not alleged that either the

¹⁶ Letter from Roderick Porter, Deputy Chief, International Bureau, and Julius Knapp, Chief Engineer, Office of Engineering and Technology, to Robert L. Hoegle, attorney for Liberty Media Corporation, DA 12-717, 27 FCC Rcd 5036, 5036 (IB/OET 2012), citing 47 C.F.R. 25.112(a)(1).

assignee, OTA, or the assignor, KAXT, LLC, lacks the requisite qualifications to be a Commission licensee. Their sole complaint rests on the pendency of a private contractual dispute that is being addressed in other, more appropriate, tribunals. As the Petitioners have raised no substantial or material issue of fact that needs to be resolved by the Commission, the Petition should be dismissed; and the Assignment Application promptly granted.

Respectfully submitted,

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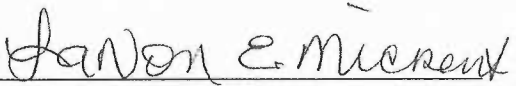
April 1, 2013

CERTIFICATE OF SERVICE

I, LaVon E. Nickens, certify that on this 1st day of April, 2013, I served copies of the foregoing Opposition to "Petition To Dismiss, Deny, Or, In The Alternative, Hold Application In Abeyance", by causing them to be delivered by first class, postage prepaid U.S. mail to the following:

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