

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Application of)
)
KTVU, LLC,)
Assignor)
)
and)
)
Fox Television Stations, Inc.,)
Assignee)
)
For Consent to Assignment of Licenses of)
KTVU(TV), Oakland, KICU-TV, San Jose, and)
K29AB, Monterey, etc., all California)

File No. BALCDT-20140701ABV

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AUG 20 2014

**Federal Communications Commission
Bureau / Office**

To: Chief, Video Division, Media Bureau

JOINT OPPOSITION TO PETITION TO DENY

Fox Television Stations, Inc. (“FTS”), and KTVU, LLC (the “Applicants”), hereby jointly oppose the Petition to Deny the captioned application (the “Application”) filed on August 6, 2014 (the “Petition”) by the Asian Pacific Islander American Public Affairs Association (“APAPA”).¹

APAPA would have the Commission deny the Application based solely on its perceived concern that, under FTS’s ownership, the Stations *might* in the future broadcast content that certain of APAPA’s constituents *might* deem objectionable. Leaving aside that it is based entirely on speculation and surmise—reason enough to reject it out of hand—APAPA’s

¹ This Joint Opposition is timely filed pursuant to Sections 1.4, 1.47 and 73.3584 of the Commission’s Rules, 47 C.F.R. §§ 1.4, 1.47 and 73.3584. The Application is one of two contemporaneously filed applications on FCC Form 314 seeking Commission consent to transactions pursuant to which FTS will acquire KTVU, KICU-TV and K29AB (the “Stations”), and Cox Media Group, LLC, will acquire WFXT(TV), Boston, Massachusetts, and WHBQ-TV, Memphis, Tennessee. The parties have requested that the applications be processed concurrently. The application with respect to WFXT and WHBQ-TV is unopposed. See FCC File No. BALCDT-20140701AAZ.

Petition is a misguided and disturbing attempt to implicate the Commission in a broadcaster's Constitutionally-protected exercise of its good faith editorial judgment.

The Commission follows a two-step analysis with respect to petitions to deny under the public interest standard. First, the Commission determines whether a petition contains specific allegations of fact sufficient to demonstrate that granting the application would be *prima facie* inconsistent with the public interest.² Such allegations must be supported by the affidavit of a person with knowledge of the facts alleged, except for those of which the Commission may take official notice.³ Second, if the specific allegations establish a *prima facie* case, the Commission examines and weighs the evidence presented to determine “whether the totality of the evidence raises a substantial and material question of fact justifying further inquiry.”⁴

The Petition fails to satisfy either part of this standard. As demonstrated below, neither APAPA's speculative assumptions about the future operation of the Stations, nor its objections to certain content available on cable television, can overcome its failure to adduce any evidence raising a question regarding FTS's qualifications to acquire and operate the Stations under the Communications Act or the FCC Rules. The Petition is without merit and should be dismissed or denied forthwith.

APAPA predicts that under FTS's ownership the Stations will “adopt extreme and outrageous TV personalities and languages” and that “the three stations [will] be indifferent to the Bay Area's unique diverse culture.”⁵ As a threshold matter, the Commission does not make

² 47 U.S.C. § 309(d)(1); *Astroline Commc'ns Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

³ 47 U.S.C. § 309(d)(1); 47 C.F.R. § 73.5006(b).

⁴ *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985).

⁵ Petition at 6.

licensing decisions on the basis of speculative allegations regarding an applicant's future conduct.⁶

Even if true, APAPA's allegations would be insufficient to make out a *prima facie* showing that grant of the Application would disserve the public interest. Contrary to APAPA's contention, programming decisions, like matters of taste, are not within the Commission's jurisdictional purview.⁷ Indeed, a bedrock principle of the Communications Act's public interest standard is that the Commission "will not interfere with the exercise of a licensee's programming judgment where there is no showing that the licensee consistently and unreasonably ignored matters of public concern."⁸

Here, APAPA does not even allege, much less provide any evidence, that FTS's historical programming decisions have failed to serve the public interest with respect to any broadcast station owned by FTS. Instead, APAPA's allegations pertain solely to certain programming it alleges was aired on Fox News Channel, a non-broadcast corporate affiliate of FTS, that in APAPA's opinion was objectionable. FTS is not responsible for the alleged programming that APAPA deems objectionable, so it is irrelevant to the FCC's review of the Application. And even if the FCC were to determine that FTS bears any responsibility for certain programming that appeared on the Fox News Channel cable network, the Commission

⁶ See, e.g., *Affiliated Media, Inc. FCC Trust*, DA 13-2098 (Vid. Div. MB 2013) (declining to adopt conditions to grant of assignment application on the basis of "speculative, premature, and unsupported" allegations regarding proposed assignee's future operation of station).

⁷ See, e.g., *Starr WNCN, Inc.*, 48 F.C.C.2d 1221, *stay denied*, 50 F.C.C.2d 423 (1974) (format and program responsibility "rests with the judgment of the licensee"); *Corvallis TV Cable Co.*, 59 F.C.C.2d 1282 (1976) (Commission "can neither guarantee nor direct" program offerings by a licensee "or by subsequent licensees.").

⁸ *Letter to Mr. Edward R. Stolz II and Brian M. Madden, Esq.*, 23 FCC Rcd 3695, 3703 (Audio Div. MB 2008) (citing *Columbia Broadcasting System, Inc.*, Memorandum Opinion and Order, 51 F.C.C.2d 273, 277 (1975)).

should note that none of that programming violated the Communications Act or any FCC rule.⁹ Indeed, the programming would not have implicated the Act or any rule *even if it had aired on a broadcast station.*¹⁰

Moreover, and fundamentally, the First Amendment and Section 326 of the Communications Act prohibit the Commission from censoring broadcasters' program choices or from otherwise playing any role in the selection of broadcast content.¹¹ Even as broadcasters are required to serve the public interest by providing locally responsive programming, the Commission is Constitutionally bound to ensure that it does "not sit to review the broadcaster's news judgment, the quality of his news and public affairs reporting, or his taste."¹² More to the point, the Commission has made clear that it will not make licensing decisions "based on the subjective determination of a listener or group of listeners as to what constitutes appropriate programming."¹³

⁹ See, e.g., *Various Complaints Regarding CNN's Airing of the 2004 Democratic National Convention*, 20 FCC Rcd 6070 (2005).

¹⁰ See, e.g., *Complaints Concerning Network Coverage of the Democratic National Convention*, 16 F.C.C.2d 650 (1969).

¹¹ See U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press."); 47 U.S.C. § 326 ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.").

¹² *Complaints Concerning Network Coverage of the Democratic National Convention*, *supra*, at 654; *Affiliated Media, Inc. FCC Trust*, *supra* ("The First Amendment and section 326 of the Communications Act bar us from withholding approval of a transaction based on a change in editorial perspective."); *National Broadcasting Co.*, 14 FCC Rcd 9026 (1999) at ¶ 18 (Section 326 of the Communications Act and the First Amendment to the Constitution prohibit any Commission action which would improperly interfere with the programming decisions of licensees."); *Letter from Chief, Video Division, Media Bureau, FCC to Victoria Strange*, 22 FCC Rcd 12846, 12848 (Vid. Div. MB 2007) ("[T]he FCC is prohibited by section 326 of the Act from censoring programs or from interfering with freedom of expression in broadcasting.").

¹³ *John Neely, Esq.*, 2007 WL 1246137 (2007). Applicants also object to APAPA's false statement that "KTVU[] has a history of making racist comments." Petition at 4. The single unfortunate incident of misreporting to which APAPA refers did not violate the Act or any FCC rule. KTVU personnel immediately apologized on-air, explained how the mistake occurred, undertook an internal review, and took actions and implemented procedures to ensure that the incident would not be repeated. That single event does not diminish KTVU's historical commitment to and record of serving the diverse San Francisco community; and it provides no basis for denying the Application.

For the foregoing reasons, the Applicants respectfully request that APAPA's Petition to Deny be dismissed or denied and the Application be granted promptly.

Respectfully submitted,

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August 20, 2014

Certificate of Service


I, Paul Swain, hereby certify that on this 20th day of August 2014, I caused copies of the foregoing Opposition to be delivered via first-class prepaid mail to the following:

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