

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

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

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 2018

Released: September 18, 2018

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. The Commission, Chief, Video Division, Media Bureau, has before it a Petition for Reconsideration filed by Nalini Kapur, Rishi Kapur, and Ravi Kapur (the “Kapur” or “Petitioners”),¹ seeking review of a November 3, 2017, Commission decision² denying an Application for Review of multiple Video Division decisions that relate to the sale of station KAXT-CD, San Francisco-San Jose, California to OTA Broadcasting (SFO), LLC (“OTA”) (“Assignment Application”). Specifically, the Video Division denied both a Petition for Further Reconsideration of grant of the Assignment Application and a separate Petition for Reconsideration

¹ Petition for Reconsideration of Nalini Kapur, Rishi Kapur, and Ravi Kapur (filed Dec. 4, 2017) (the “Petition”). The parties have filed responsive pleadings. OTA Broadcasting (SFO), LLC’s Opposition to Petition for Reconsideration (filed Dec. 18, 2018) (“OTA Opposition”); Reply to Opposition to Petition for Reconsideration of the Kapurs (filed Dec. 28, 2017) (“Kapur Reply”).

² *KAXT, LLC and OTA Broadcasting (SFO), LLC*, Memorandum Opinion and Order, 32 FCC Rcd 9638 (2017) (“*Commission MO&O*”).

of the license renewal for KAXT-CD (“Renewal Application”).³ Pursuant to Section 1.106(p) of the Commission’s rules,⁴ we dismiss this latest Petition for Reconsideration.

II. BACKGROUND

2. Other than new allegations regarding the Political File practices of OTA, the issues raised by the Kapurs are a reprise of an ongoing dispute between the Kapurs and both OTA and the majority members of KAXT, LLC, the previous licensee, that stem originally from the allegation that the sale to OTA was *ultra vires*.⁵ The Kapurs re-assert arguments made below: that OTA threatened the Kapurs with “punishing litigation” in a letter from OTA’s counsel unless they withdrew their pleadings;⁶ that OTA has continued to omit pending character allegations in its applications even after a March 2015, admonishment by staff;⁷ that OTA actively collaborated with the controlling members of KAXT, LLC, against the Kapurs during arbitration of a contractual dispute;⁸ that OTA misrepresented to the Commission by not certifying “Yes” as to whether a felon is a party to the assignor’s portion of the Application;⁹ and that Lawyer, the alleged felon, was not properly insulated.¹⁰

3. On January 18, 2017, the Media Bureau issued the *2017 Consent Decree*,¹¹ which settled an investigation “relating to the maintenance of Political Files for public inspection, which commenced with the receipt of a complaint, dated November 2, 2016, from Ash Kalra.”¹² On July 12, 2017, the Kapurs filed a pleading in that proceeding entitled “Submission of New Material Evidence Concerning the Political File Practices of OTA Broadcasting (SFO), LLC,”¹³ arguing

³ See *KAXT, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 8266 (Vid. Div. MB 2014) (“*MO&O*”); *KAXT, LLC and OTA Broadcasting (SFO), LLC*, Memorandum Opinion and Order, 30 FCC Rcd 2691 (Vid. Div. MB 2015) (“*Reconsideration MO&O*”); and *KAXT, LLC and OTA Broadcasting (SFO), LLC*, Memorandum Opinion and Order, 30 FCC Rcd 14102 (Vid. Div. MB 2015) (“*Further Reconsideration MO&O*”).

⁴ 47 C.F.R. §§ 1.106(p).

⁵ The *Commission MO&O*, and prior staff decisions involving this dispute, comprehensively discuss the factual background and procedural history. We need not discuss the full factual and procedural background in this order. However, the original allegation that commenced this proceeding involved a claim that the majority members of KAXT, LLC, did not have authority to enter into the transaction with OTA.

⁶ Petition at 3-4.

⁷ *Id.* at 12.

⁸ *Id.* at 13-14.

⁹ *Id.* at 11.

¹⁰ *Id.* at 11-12.

¹¹ *Investigation into the Political Filed Practices of OTA Broadcasting (SFO), LLC*, Order and Consent Decree, 32 FCC Rcd 795 (MB 2017) (“*2017 Consent Decree*”).

¹² *Id.* at 797 (defining “Investigation” for purposes of the Consent Decree).

¹³ See Petition, Att. A, “Submission of New Material Evidence Concerning the Political File Practices of OTA Broadcasting (SFO), LLC,” Acct. No. MB-201741410002, File No. 161007 (filed Jul. 12, 2017) (“Kapurs July 12, 2017 Submission”).

that additional evidence that had come to light vitiated the *2017 Consent Decree*.¹⁴ Though raised ostensibly in the consent decree proceeding, the Kapurs argue here that the additional evidence cited in their July 12, 2017, filing was not procedurally barred from being raised in the instant proceeding since the Political File violations occurred after the due date for filing the subsequently denied Application for Review.¹⁵ As they have requested throughout the instant proceeding, the Kapurs seek a hearing on OTA's character qualifications. In addition to the violations underlying the *2017 Consent Decree*, the Kapurs also cite OTA's failure to amend its online public inspection file to include certain materials relevant to the Political File investigation.¹⁶

4. OTA responds that the Petition does not identify any errors of fact or law warranting reconsideration of the *Commission MO&O*, and the Kapurs' repeated filing of meritless challenges in order to obtain leverage in their ongoing dispute with their former business partners constitutes a textbook example of abuse of process.¹⁷ The Kapurs ask the Commission to put an end to this abuse by imposing sanctions to prohibit repetitive pleadings, consistent with precedent.¹⁸

5. OTA does contend that with regard to whether the "new" evidence regarding the Station's maintenance of its political broadcasting file was unavailable at the time of the adoption of the *Commission MO&O*, the Kapurs not only had the opportunity to present these facts but in fact did so through multiple filings, including the Kapurs July 12, 2017 Submission. OTA also points out that the Kapurs never sought to supplement or amend their Application for Review itself, even though the Commission has authority to consider supplemental filings that rely on new facts. OTA further argues that the Media Bureau's Policy Division should consider such evidence in the first instance, and it should not be the basis for reconsideration of the *Commission MO&O*. OTA points out that the Petition did not identify a single instance where the Commission disapproved a license assignment, or refused to renew a license, on the basis of such Political File allegations.¹⁹

6. The Kapurs reply that OTA did not address the merits of the alleged new facts, and that its failure to defend itself means that the fact of record stands undisputed.²⁰ They argue that the issue is not the Political File violations in

¹⁴ *Id.* at 7-10. The Kapurs allege that KAXT never posted in its political file any indication of its carriage of political advertising on certain dates in October and early November, 2016. *Id.* at 6-12.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 9-10.

¹⁷ OTA Opposition at 2, 15.

¹⁸ *Id.* at 13 (citing *Warren C. Havens*, Third Order on Reconsideration, 26 FCC Rcd 10888 (2011) ("*Havens Third Reconsideration Order*"); *Warren C. Havens*, Memorandum Opinion and Order, 27 FCC Rcd 2756 (2012)). We need not evaluate the abuse of process claim at this time as we are dismissing on other grounds. However, we caution the Kapurs to limit filings to those provided by the Act or the rules.

¹⁹ *Id.* at 4-5.

²⁰ Kapurs Reply at 2-3.

isolation, but the willful and repeated violations of both the rules and the Act.²¹

III. DISCUSSION

7. Section 1.106(p) of the Commission's rules permits the delegated authority to dismiss or deny a petition for reconsideration of a Commission action if it does not warrant consideration. Examples of such warrantless petitions for reconsideration provided in the rule section include, among others, petitions that (1) fail to identify any material error, omission; (2) rely on facts or arguments that have been fully considered and rejected by the Commission within the same proceeding; or (3) relate to matters outside the scope of the order for which reconsideration is sought.²²

8. With the exception of the allegations concerning Political File violations, all of the allegations raised in the Petition have been raised before the delegated authority and the Commission and have been fully considered and rejected in this proceeding. For example, the Kapurs request reconsideration of the Commission's rescission of the Division admonishment of OTA for failing to amend its filings to report the character allegations that the Kapurs had made against OTA.²³ However, these arguments previously have been fully considered and rejected by the Commission.²⁴ The Kapurs also argue that the *Commission MO&O* warrants reconsideration because, contrary to the findings of the Commission, publicly available documents regarding the felony conviction of an OTA officer were not sufficient to demonstrate that the Kapurs should have known of that felony in a timely manner.²⁵ Again, the Commission rejected this

²¹ *Id.* at 7. On February 9, 2018, the Kapurs also filed a Supplement to Petition for Reconsideration, addressing an e-mail response from OTA to the Media Bureau submitted in the course of the political file investigation and posted in KAXT's online public inspection file on January 19, 2018.

²² 47 C.F.R. §§ 1.106(p)(1), (2), and (5).

²³ Petition at 12-13; *Commission MO&O* at 9645-46, para. 16.

²⁴ *See Commission MO&O*, 32 FCC Rcd. at 9647. As the orders in this proceeding have repeatedly explained, the rules permit a petition for reconsideration to be entertained only where "[t]he petition relies on facts or arguments unknown to the petitioner until after his last opportunity to present them to the Commission *and* he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity." 47 CFR § 1.106(b)(2)(ii), as incorporated in 47 CFR § 1.106(c)(1) (emphasis added). The Commission fully considered and rejected the Petitioners' argument that the rationale for the rescission was infirm, concluding that *Greater Muskegon Broadcasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 1564 (1996) ("*Greater Muskegon*") was indeed applicable. Specifically, the Commission held that the requirement to report an "unresolved" issue of character pending against an applicant is triggered not by the mere allegation of character against an applicant in another proceeding, but where "such allegations are determined to have merit and are designated for hearing" *See Commission MO&O* at 9645, para. 16 (citing *Greater Muskegon*, 11 FCC Rcd at 15472).

²⁵ Petition at 11-12 (stating that an insulation letter that OTA filed with the Commission failed to say anything about Lawyer's felony, and that the news release by the U.S. Attorney's Office did not announce Lawyer's guilty plea until the fourth paragraph.)

argument.²⁶ Accordingly, we find that the Petitioners fail to identify any material error, omission, or reason warranting reconsideration of the *Commission MO&O*.²⁷

9. The Bureau settled all matters related to OTA's Political File practices occurring prior to the adoption and release of the *2017 Consent Decree*.²⁸ The *2017 Consent Decree* included a settlement of the alleged "new material" violations.²⁹ The Bureau's determination to resolve these issues pursuant to the terms of the *2017 Consent Decree* amounts to a decision not to pursue an enforcement action that is generally committed to an agency's absolute discretion.³⁰ The alleged misconduct cited by the Kapurs took place prior to the adoption and release of the *2017 Consent Decree*, and the consent decree therefore captures those purported violations. Any challenge to the *2017 Consent Decree* itself in the context of this separate proceeding constitutes an impermissible collateral attack.³¹ We have reviewed the allegation that OTA subsequently committed a separate violation of Section 73.3526(e)(10) of the rules by failing to place in KAXT-CD's public inspection files certain emails related to the investigation, and do not find that such failure raises a substantial and material question of fact as to

²⁶ In the Application for Review, the Kapurs argued that "[T]he Bureau used a clearly erroneous standard in refusing, solely on timeliness grounds, *even to consider* the Petitioners' allegation that, given OTA's failure to insulate Todd Lawyer in the OTA organizational documents and its ineffective reliance on the fundamentally flawed Lawyer Letter, OTA falsely certified in the Assignment Application (and many other filings) that no party to the application was a felon." (emphasis in original) Kapurs' Application for Review at 7. The Commission rejected this argument on timeliness grounds, in part because the Kapurs had already acknowledged that examination of Commission files was all that was necessary to learn of Todd Lawyers' conviction. *Commission MO&O*, 32 FCC Rcd at 9647, n. 75. We reject the argument that insulation cannot be effected by letter agreement amending an LLC's organizational documents. All that was necessary to remove Mr. Lawyer as a party to the application was to make the interest nonattributable via insulation from the broadcast activities of the licensee or any party in control of the licensee. The instructions to Section III, Item 4 of the FCC Form 314 state the following: "as used in this application form, the term "party to the application" includes any individual or entity whose ownership or positional interest in the applicant is attributable." Thus, it is immaterial whether or not the insulation letter mentioned whether Mr. Lawyer was a felon. Any argument regarding misapplication of *Greater Muskegon* is also mooted and immaterial.

²⁷ The Kapurs cite to a filing asking the Commission not to disburse any Incentive Auction funds to OTA. Petition at 3 (further citations omitted). Notwithstanding the legal standing of the Kapurs to even submit the filing, as an informal request for Commission action, neither staff nor the Commission were obligated to address it. See 47 CFR § 1.41.

²⁸ See *2017 Consent Decree*, 32 FCC Rcd at 797 (definition of "Investigation").

²⁹ *Id.* ("Investigation" means the Bureau's investigation of OTA Broadcasting's compliance with Sections 315(e) of the Act, 47 U.S.C. § 315(e), and 73.1943 of the Rules, 47 C.F.R. § 73.1943, relating to the maintenance of Political Files for public inspection, which commenced with the receipt of a complaint, dated November 2, 2016, from Ash Kalra.).

³⁰ *New York State Dep't of Law v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993); *accord, NTCH, Inc. v. FCC*, 841 F.3d 597, 503 (D.C. Cir. 2016). See, also, *SEC v Citigroup Global Markets Inc.*, 673 F.3d 158, 163 (2d Cir. 2012) ("... the scope of a court's authority to second-guess an agency's discretionary and policy-based decision to settle is at best minimal").

³¹ *In the Matter of Verizon Communications Inc. and Straight Path Communications, Inc. For Consent to Transfer Control of Local Multipoint Distribution Service, 39 GHz, Common Carrier Point-to-Point Microwave, and 3650-3700 MHz Service Licenses*, Memorandum Opinion and Order, FCC 18-85 (rel. Jul. 2, 2018).

character.³²

IV. ORDERING CLAUSES

10. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a), and Section 1.106 of the Commission’s rules, 47 CFR § 1.106, the Petition for Reconsideration filed by Nalini Kapur, Rishi Kapur, and Ravi Kapur IS DISMISSED.

COMMISSION
FEDERAL COMMUNICATIONS

Barbara A. Kreisman
Chief, Video Division
Media Bureau

³² This new evidence is not outside the scope of the Consent Decree, and even if it were, the Petitioners fail to demonstrate how a local ballot on affordable housing would be a “national legislative issue of public importance” that would constitute a “political matter of national importance.” Petition at 8-9; 47 U.S.C. § 315(e)(1)(B).