

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

In the Matter of)
Philip E. Kuhlman and)
Ellen N. Kuhlman, Assignors)
And)
The Rain Broadcasting, Inc., Assignee)
Application For Assignment of License)
for Station WYAC-FM)
Christiansted, Virgin Islands)
NAL/Acct. Nos. MB200741410384,
MB200741410390
FRN: 0011388261
0017086810
File No. BALH-20061206ACT
Facility ID No. 62114

MEMORANDUM OPINION AND ORDER AND ADOPTING ORDER

Adopted: December 13, 2007

Released: December 14, 2007

By the Chief, Media Bureau:

1. In this Order, we adopt the attached Consent Decree entered into by the Media Bureau (the "Bureau"), Philip E. Kuhlman and Ellen N. Kuhlman (the "Licensees"), licensees of Station WYAC-FM, Christiansted, Virgin Islands, and The Rain Broadcasting, Inc. (the "Broker"). The Consent Decree resolves issues arising from several informal objections filed against the captioned license assignment application ("Assignment Application") for the Station. For the reasons set forth below, we also deny in part, and dismiss with prejudice in part, the Informal Objections.

I. BACKGROUND

2. In their Informal Objection, the Senators allege that the Assignment Application should be denied because: (1) the Broker allowed a delegate to the Virgin Islands Constitutional Convention to host a program on the Station the day before the election, in violation of Section 315 of the Communications Act of 1934, as amended (the "Act") ("Section 315 Allegation"); (2) the Licensees

1 A pleading entitled "Petition to Deny Transfer" was filed by five Senators from the Legislature of the Virgin Islands (the "Senators") on January 11, 2007. Because the Senators' pleading was not served on the Licensee as required by 47 U.S.C. § 309(d), it will be treated as an informal objection under 47 C.F.R. § 73.3587. Additional informal objections were filed by a group of permanent residents of St. Croix, and several individual residents of St. Croix (collectively, the "Objectors"), on January 11, 2007, January 18, 2007, and February 6, 2007. Extensive responsive pleadings were filed in this matter. Each pleading was fully considered and for administrative convenience we will refer to the groups of pleadings filed by the Objectors as Informal Objections and those filed by Rain and the Kuhlman as Responses.

2 47 U.S.C. § 315.

violated Section 73.1125 of the Commission's Rules (the "Rules"),³ and (3) an unauthorized transfer of control of the Station occurred between the Licensees and the Broker. Additionally, the Informal Objections filed by the Objectors claim that granting the Assignment Application is not in the best interests of the residents of St. Croix because: (1) Rain, as current operator of the Station, is using the Station to "destabilize the legislative branch of the government . . . and to promote divisiveness within the St. Croix community;" (2) Rain has used the Station for "political reasons" without offering equal airtime to those holding opposing views; and (3) Rain has used the Station "to lodge personal attacks on sitting senators" (collectively the "Programming Objections").

3. In response, the Licensees and the Broker allege that the Section 315 Allegation is without merit because candidates for the position of a delegate to the Virgin Islands Constitutional Convention are not considered candidates for public office, and that Section 326 of the Act⁴ and the First Amendment of the United States Constitution prohibit the Commission from granting the Programming Objections. With respect to the Section 73.1125 and unauthorized transfer of control allegations, the Licensees and the Broker have negotiated the terms of the attached Consent Decree with the Bureau.

II. DISCUSSION

4. *Section 315 Allegation.* Section 315(a) of the Act provides that "if any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."⁵ The Senators allege that the Broker violated Section 315(a) of the Act when it allowed a delegate to the Virgin Islands Constitutional Convention to host a program on the Station the day before the election. In order to show a violation of Section 315(a) of the Act, the burden is on the Senators to show that the constitutional convention delegates are considered candidates for public office and that other such candidates made a request for and were denied equal access by the Station.

5. Under the laws of some states, persons seeking election as delegates to state constitutional conventions have been considered legally qualified candidates for public office by the state officials authorized to make such rulings. In such cases, candidates for delegate are candidates for public office under the Rules.⁶ The Senators have not shown that candidates for a delegate position at the constitutional convention are considered to be candidates for public office by Virgin Islands officials. Absent an affirmative showing to the contrary, the Commission does not consider such candidates to be candidates for public office. Assuming, *arguendo*, that candidates for the delegate positions would be considered legally qualified candidates for public office under the Rules, the Senators have failed to show that other candidates requested and were denied equal access after the appearance in question. Without such evidence, the Senators have failed to make a *prima facie* showing that the Broker violated Section 315(a) of the Act, and their Section 315 Allegation will be denied.

6. *Programming Objections.* Viewed in the light most favorable to the Objectors, the allegations made in the informal objections amount to no more than a disagreement with the content of the programming on the Station. While we recognize the Objectors' concerns about the quality of the Station's programming, the role of the Commission in overseeing program content is limited. The First Amendment to the United States Constitution and Section 326 of the Act prohibit the Commission from

³ 47 C.F.R. § 73.1125 (the "Main Studio Rule").

⁴ 47 U.S.C. § 326.

⁵ 47 U.S.C. § 315(a); *see* 47 C.F.R. § 73.1941.

⁶ *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 100 FCC 2d 1476 at ¶ 20 (1984).

censoring program material or interfering with broadcasters' free speech rights. Generally, the Commission will not take adverse action on an application based upon the subjective determination of a listener or group of listeners as to what constitutes appropriate programming.⁷ A licensee has broad discretion to choose, in good faith, the programming that it believes serves the needs and interests of the members of its audience.⁸ We will intervene in programming matters only if a licensee abuses that discretion.⁹ The Objectors have not demonstrated that the Station has done so here.

7. With respect to the Objectors' claim that equal airtime was denied to the Senators and like-minded parties to present opposing views, the argument appears to be grounded in the Fairness Doctrine,¹⁰ not Section 315 of the Act, and is unavailing. The Commission ceased enforcing the Fairness Doctrine in 1987, holding that the Doctrine contravened the First Amendment and that its enforcement was no longer in the public interest.¹¹ Regarding the Objectors' claim that Rain "lodge[d] personal attacks on sitting senators," we note that the "personal attack rule" was repealed on October 26, 2000,¹² pursuant to an Order of the D.C. Circuit Court of Appeals.¹³ The Objectors have not shown that the programming choices made by the Licensees or the Broker have violated any provision of the Act or the Rules. For these reasons the Programming Objections will be denied.

8. *Unauthorized transfer of control.* Upon review of the Senators' allegations of unauthorized transfer of control and a Main Studio Rule violation, the Bureau initiated an investigation and asked the Licensees to provide more information about which party is in ultimate control of the Station's programming, personnel, and financial decisions. After fully considering the Licensees' response, the Bureau, the Licensees, and the Broker have negotiated the terms of a Consent Decree, a copy of which is attached hereto and incorporated by reference.¹⁴ The Consent Decree provides, among other things, that the Broker will implement a Compliance Plan, the Licensees will make a \$15,000 voluntary contribution to the United States Treasury, and the Broker will make an \$8,000 voluntary contribution to the United States Treasury.

9. Based upon the record before us, including the acknowledgement of the conduct involved by the Licensee; the Broker's commitment to implement a Compliance Plan to avoid future violations; and the fact that the Licensees will no longer hold a Commission license or be involved in the operation of any station; we conclude that no substantial or material questions of fact exist as to whether the Licensees or the Broker possess the basic qualifications, including those related to character, to hold any Commission license or authorization.

⁷ See *WGBH Educational Foundation*, Memorandum Opinion and Order, 69 FCC 2d 1250, 1251 (1978).

⁸ See, e.g., *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993) ("*Philadelphia Station License Renewals*") (citing *Time-Life Broadcast, Inc.*, Memorandum Opinion and Order, 33 FCC 2d 1081, 1082 (1972), and *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (subsequent history omitted)).

⁹ *Philadelphia Station License Renewals* at 6401.

¹⁰ 47 C.F.R. § 73.1910.

¹¹ *Syracuse Peace Council*, Memorandum Opinion and Order, 2 FCC Rcd 5043, 5052 (1987), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied* 493 U.S. 1019 (1990).

¹² *In re Repeal or Modification of the Personal Attack and Political Editorial Rules*, Order, 15 FCC Rcd 20697 (2000).

¹³ *Radio-Television News Directors Association v. FCC*, 229 F.3d 269 (D.C. Cir. Oct. 11, 2000).

¹⁴ See 47 C.F.R. § 1.1204(a)(10) (presentations related to settlement are classified as exempt *ex parte* presentations).

10. After reviewing the terms of the Consent Decree, we find that the public interest will be served by its approval and by terminating all pending proceedings relating to the Bureau's consideration of whether the Licensees and the Broker participated in an unauthorized transfer of control or violated the Main Studio Rule. Therefore, the portion of the Senators' Informal Objection pertaining to these allegations will be dismissed with prejudice.

III. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED that, the Informal Objections filed by the Senators and the Objectors are DENIED IN PART and DISMISSED WITH PREJUDICE IN PART.

12. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended,¹⁵ and by the authority delegated by Sections 0.61 and 0.283 of the Rules,¹⁶ the Consent Decree attached hereto IS ADOPTED.

13. IT IS FURTHER ORDERED that the investigation by the Media Bureau of the matters noted above IS TERMINATED.

14. IT IS FURTHER ORDERED that copies of this Order shall be sent, by first class mail and certified mail, return receipt requested, to Philip E. Kuhlman and Ellen N. Kuhlman, PO Box 24522, Christiansted, Virgin Islands 00824-0522; The Rain Broadcasting, Inc., 5025 Anchor Way, St. Croix, Virgin Islands 00820; their counsel Harry F. Cole, Esq. and Francisco R. Montero, Esq., Fletcher, Heald & Hildreth, P.L.C., 1300 North 17th Street, 11th Floor, Arlington, Virginia 22209; and by first class mail to the Senators, their counsel, and the Objectors at the addresses listed in the Appendix.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

¹⁵ 47 U.S.C. § 154(i).

¹⁶ 47 C.F.R. §§ 0.61, 0.283.