

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

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|--|---|----------------------------|
| In the Matter of |) | |
| |) | |
| KAXT, LLC |) | File No BALDTA-20130211ACT |
| (Assignor) |) | Facility ID No. 37689 |
| |) | |
| and |) | |
| |) | |
| OTA Broadcasting (SFO), LLC |) | |
| (Assignee) |) | |
| |) | |
| For Consent to Assign the License of Station |) | |
| KAXT-CD, San Francisco-San Jose, California |) | |

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 2014

Released: July 11, 2014

By Chief, Video Division, Media Bureau

I. INTRODUCTION

1. The Federal Communications Commission (“Commission”), by the Chief, Video Division, Media Bureau, pursuant to delegated authority, grants the above-captioned application seeking consent to assign the license for station KAXT-CD, San Francisco-San Jose, California (“Station”) from KAXT, LLC (“KAXT”) to OTA Broadcasting (SFO), LLC (“OTA”) (collectively, “Applicants”). For the reasons set forth below, we deny the Petition to Dismiss, Deny, or, in the Alternative, Hold Application in Abeyance (“Petition”) and the Supplement to the Petition (“Informal Objection”) filed by Ravi Kapur, Nalini Kapur, and Rishi Kapur (collectively, “Petitioners”).

II. BACKGROUND

2. The Applicants submitted, along with the above-captioned application, an Asset Purchase Agreement (“APA”), signed by and between OTA and KAXT, executed by Warren L. Trumbly on behalf of KAXT as LLC Managing Member.¹ Trumbly is also a signatory to the Application itself on behalf of KAXT. The Petitioners filed the Petition, arguing that Trumbly lacked authority to execute the APA and the Application where no single member of KAXT holds a majority of the entity’s overall membership interests, and that numerous key facts concerning the ownership and control of KAXT were in dispute. Petitioners cite to Trumbly’s initiation of an arbitration proceeding seeking declaratory relief that the execution and delivery of the APA was duly and validly authorized by the managers and members of

¹ See File No. BALDTA-20130211ACT, Att. 5. Trumbly and OTA entered into the APA on January 28, 2013.

KAXT,² and argue that this filing constitutes an admission that Trumbly has presented the Commission with an Application that is not ripe for processing or grant.³

3. KAXT filed an Opposition to the Petition (“KAXT Opposition”) asserting that the members of KAXT holding a majority interest properly approved the sale of the Station assets to OTA and authorized the filing of the Application.⁴ KAXT points to KAXT’s acquisition of the Station in 2009, in which Petitioners represented to the Commission that they held 42% of the member interests.⁵ KAXT further argues that the Commission presumes that the execution of a sales contract and filing of the associated application is authorized by appropriate licensee action; will process and grant such application absent a clear showing to the contrary; and will not intervene in disputes between private parties.⁶

4. OTA filed an Opposition to the Petition (“OTA Opposition”) arguing that the Commission should follow its settled policies of leaving questions of state law to local tribunals, and of not delaying action on assignment applications while contractual disputes are resolved elsewhere.⁷ OTA also contends that under its precedent, the Commission should not defer grant of a complete assignment application based on a pending private dispute over the signatory’s authority.⁸

5. The Petitioners filed a Consolidated Reply to Oppositions (“Reply”), arguing that both Oppositions are procedurally flawed under the Commission’s rules because they lack declarations by anyone with personal knowledge of the facts set forth.⁹ The Reply reiterates the Petition’s arguments, and contends that the initiation of arbitration undermines KAXT’s assertion that the Application should be entitled to any presumption that it was authorized by the appropriate licensee action.¹⁰

6. On September 25, 2013, KAXT filed a Supplement to Opposition, attaching the text of the Arbitrator’s Phase 1 Award, which declared that the APA was duly authorized and validly executed by KAXT.¹¹ KAXT contends that this decision should resolve all outstanding issues raised in the Petition.¹² On October 22, 2013, the Petitioners filed a Response to the Supplement to Opposition (“Petitioners’ Response to KAXT Supplement”), responding that the Arbitrator’s Award is merely one step in an ongoing arbitration process which must run its course before any Commission action would be appropriate.¹³ The arbitrator issued a Final Arbitration Award on January 22, 2014, incorporating the Phase 1 Arbitration Award.¹⁴

² See Petition, Att. A, Demand for Arbitration.

³ Petition at 3-7.

⁴ KAXT Opposition at 1-2.

⁵ KAXT Opposition at 3 (citing BALTTA-20090820ABO).

⁶ KAXT Opposition at 2.

⁷ OTA Opposition at 3-5.

⁸ OTA Opposition at 5-7.

⁹ Reply at 2 (citing 47 C.F.R. § 73.3584(c)).

¹⁰ Reply at 5.

¹¹ KAXT Supplement to Opposition, Att., *Trumbly v. Kapur*, Phase 1 Award of Arbitrator, No. 74-140-00012-13 SM, American Arbitration Association at 15-16 (dated Sep. 17, 2013).

¹² KAXT Supplement to Opposition at 2.

¹³ Petitioners’ Response to KAXT Supplement at 2.

¹⁴ *Trumbly v. Kapur*, Final Award, Exh. A, at 7, No. 74-140-00012-13 SIM, American Arbitration Association (dated Jan. 22, 2014)) (attached to OTA Supplement to Comments on Supplement to Petition, Exh. 1.)

7. On February 24, 2014, Petitioners filed a Supplement to their Petition (“Informal Objection”) asserting that OTA lacks the necessary character qualifications to purchase the Station. In support, Petitioners append a letter from OTA’s counsel to Petitioners’ counsel urging the Petitioners to withdraw the Petition in the wake of the Phase 1 Arbitration Award, in which OTA’s counsel states that OTA is prepared to pursue all available legal and equitable remedies against the Petitioners, including tortious interference and malicious prosecution.¹⁵ Petitioners allege that under Commission precedent, such threats warrant the initiation of a hearing into the character qualifications of the threatening party.¹⁶ In its response filed on March 17, 2014, OTA cites Commission precedent that broadcast applicants may enforce their contractual rights by pursuing any and all legal remedies at their disposal.¹⁷ On April 24, 2014, OTA filed another pleading to report that a California state court confirmed the arbitrator’s determination that the APA was validly executed and may be performed in accordance with its terms. On May 19, 2014, Petitioners responded to these two OTA pleadings, reiterating that it is OTA’s threat to file a lawsuit unless Petitioners’ pleadings are withdrawn that violates Commission policy and raises character issues, and asserting that the appeal process for the arbitrator’s award is not closed.¹⁸

III. DISCUSSION

8. The Commission applies a two-step analysis when it evaluates a petition to deny under the public interest standard.¹⁹ First, we must determine whether the informal objection contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.²⁰ The first step “is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged . . . were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established.”²¹ If the specific allegations make a *prima facie* case, we next examine and weigh the evidence presented, to determine “whether the totality of the evidence raises a substantial and material question of fact justifying further inquiry.”²² 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. We find that no substantial and material question of fact has been raised concerning the application and, therefore, deny the Petition and Informal Objection.

A. Authority to Sign

9. The Commission does not adjudicate private contractual matters.²³ Likewise, the Commission has long attempted to reach a fair accommodation between its exclusive authority over

¹⁵ Informal Objection, Att. A, Letter from C. William Phillips, Counsel for OTA, to Randolph Gaw, Counsel for the Kapurs (dated Feb. 17, 2014).

¹⁶ Informal Objection at 1-2, 5 (citing *Patrick Henry*, Order, 69 FCC 2d 1305 (1978)).

¹⁷ OTA Comments on Supplement to Petition (“OTA Informal Objection Comments”) at 2-6 (citing, e.g., *Fort Collins Broadcast Co., Inc.*, Memorandum Opinion and Order, 38 FCC 2d 707, 711-12 (1972) (“*Fort Collins*”).

¹⁸ Petitioners’ Reply to OTA Comments and OTA Supplement to Comments (filed May 19, 2014) (“Informal Objection Reply”).

¹⁹ 47 U.S.C. §309(d)(1), (2); *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

²⁰ 47 U.S.C. §§309(d)(1), 310(d).

²¹ *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

²² *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985).

²³ *Arecibo Radio Corp.*, Memorandum Opinion and Order, 101 FCC 2d 545, 548 (1985); *John F. Runner, Receiver*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976) (local court of competent jurisdiction, not the FCC, is the proper forum to resolve private disputes).

licensing matters and the authority of state and local courts.²⁴ The Arbitrator's declaration that the APA was validly signed and enforceable, which decision has been confirmed by a state court, moots the Petitioners' primary allegation.²⁵ Our grant is permissive, and does not mandate that the parties close on the transaction. We see no reason not to proceed with review of the Application.

10. Simply initiating the dispute resolution mechanism of arbitration where Trumbly reasonably anticipated litigation does not constitute a disqualifying expression of self-doubt.²⁶ Trumbly meets all Commission rules regarding execution, and does not concede or express any doubts about his authority to sign and file a properly executed application on behalf of KAXT. Accordingly, we find distinguishable from the proceeding before us both of the two cases that the Petitioner cites in arguing that it is Commission policy to dismiss without processing an application where a putative assignor is uncertain of its legal authority.²⁷

B. Character

11. The Petitioners' Supplement, which alleges a character issue months after the close of the deadline for filing petitions to deny, was untimely filed under section 73.3584 of the Commission's rules.²⁸ We will, therefore, treat it as an informal objection pursuant to Section 73.3587 of the Commission's rules.²⁹ Furthermore, we conclude that the Petitioners' informal objection fails to raise a substantial and material question of fact sufficient to show that grant of the subject application would be inconsistent with the public interest. Accordingly, it will be denied.

12. We agree with OTA that all applicants may enforce their contractual rights by pursuing all available legal relief without impermissibly infringing upon petitioners' rights.³⁰ In *Fort Collins*, the Commission rejected a similar charge of harassment where a petitioner claimed that a broadcast license renewal applicant threatened to file suit against the petitioner for defamation if it did not withdraw its petitions.³¹ The Commission affirmed that licensees have the right to pursue any legal remedies they may have at their disposal, and that an applicant's advising a petitioner that it might file suit does not reflect adversely on the licensee's character qualifications.³² That decision did stress that broadcast licensees should exercise great care and caution in any statements or threats to petitioners that if they file or

²⁴ See, e.g., *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) ("With ongoing litigation in the state courts, the Commission reasonably adopted, as it were, a 'wait and see' posture."); *S.A. Dawson*, Memorandum Opinion and Order, 17 FCC Rcd. 472, 474 n.15 (WTB 2002).

²⁵ See 47 C.F.R. § 1.743(a) (authorizing an officer, director, or duly authorized employee of a corporation to sign applications to the Commission on behalf of the corporation); see also 47 C.F.R. § 73.3513(a) ("Applications must be signed by the following persons: (3) Corporation. An officer, if the applicant is a corporation.").

²⁶ Moreover, FCC Form 314 requires applicants file in good faith and certify to the truth, completeness, and accuracy of all applications, and Trumbly duly signed and filed the requisite certification with the Application.

²⁷ Petition at 5-7 (citing *Peace Broadcasting Corp.*, Letter Order, 36 FCC 2d 675 (1972)) ("*Peace Broadcasting*") and *Robert L. Hoegle*, Letter Order, 27 FCC Rcd. 5036 (IB 2012) ("*Hoegle*"). In *Peace Broadcasting*, an escrow agent who questioned his own authority signed and filed an application as the assignor. In *Hoegle*, the Commission dismissed an application that constituted a hostile takeover by Liberty Media of Sirius XM Radio, Inc., where Sirius would not provide Liberty Media with its passwords, signatures and other information required to file an electronic transfer of control application.

²⁸ 47 C.F.R. § 73.3584.

²⁹ 47 C.F.R. § 73.3587.

³⁰ See OTA Comments on Petition Supplement at 2-6.

³¹ *Fort Collins*, 38 FCC 2d at 710.

³² *Id.* at 711-12.

maintain their filing, they may be subject to suit.³³ However, nothing in the record before us persuades us that OTA's correspondence discouraged access to the Commission or participation by the public.

IV. CONCLUSION

13. We have reviewed the proposed merger and related pleadings and conclude that grant of the applications as requested will comply with our rules and Section 310(d) of the Act. We conclude that the applicants are fully qualified and that grant of the assignment of KAXT-CD from KAXT to OTA will serve the public interest, convenience, and necessity.

V. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED**, That the application seeking consent to assign license KAXT-CD, San Francisco-San Jose, California from KAXT, LLC to OTA Broadcasting (SFO), LLC (File No. BALDTA-20130211ACT), pursuant to Section 310(d) of the Communications Act of 1934, 47 U.S.C. § 310(d) **IS GRANTED**.

15. **IT IS FURTHER ORDERED**, That the Petition to Dismiss filed by Ravi Kapur, Nalini Kapur, and Rishi Kapur, **IS DENIED**.

16. **IT IS FURTHER ORDERED**, That the Informal Objection filed by Ravi Kapur, Nalini Kapur, and Rishi Kapur, **IS DENIED**.

17. These actions are taken pursuant to Section 0.61 and 0.283 of the Commission's rules, 47 C.F.R. §§ 0.61, 0.283, and Sections 4(i) and (j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 309, 310(d).

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

³³ *Id.* at 712.