



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

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In re: **WFCL(FM), Nashville, TN**

Facility ID No. 69816
Vanderbilt Student
Communications, Inc.
File Nos. BRED-20120326AEY

License Renewal

Petition to Deny

BALED-20120808ABQ

Assignment of License

Informal Objection

Dear Counsel:

We have before us: (1) the above-referenced applications to renew (“Renewal Application”) and assign (“Assignment Application”) the license of Vanderbilt Student Communications, Inc. (“VSC”) for noncommercial educational (“NCE”) FM Station WFCL(FM), Nashville, Tennessee, (“Station”) to Nashville Public Radio (“Nashville”); (2) a Petition to Deny the Renewal Application (“Renewal Petition”) filed on July 2, 2012, by WRVU Friends & Family (“Friends”); (3) an Informal Objection against the Assignment Application (“Assignment Objection”), filed by Friends on September 12, 2012; and (4) related pleadings.¹ For the reasons set forth below, we grant the extension motions, deny the Renewal Petition; deny the Assignment Objection; and grant the Renewal and Assignment Applications.

Background. Agreements. On June 7, 2011, VSC and Nashville signed two documents: a management and programming agreement (“MPA”) and an asset purchase agreement (“APA”). Under the MPA, Nashville, subject to the supervision and control of VSC, is to produce and acquire programming, administer Station activities, provide for “engineering maintenance and support for Station facilities, financial management, accounting service, routine engineering services and assist[] VSC’s compliance with laws and regulations applicable to the operation of the Station.”² VSC maintained responsibility for oversight of finances and material changes in programming³ and for all employees on VSC’s payroll,⁴ and for “operating the Station in compliance with all laws, rules, policies, and regulations of the FCC.”⁵ VSC also reserved “ultimate responsibility for all activities in connection with FCC license renewals, applications for facility changes and such other filings and reports as may be required by the FCC.”⁶ Under the APA, Nashville would buy the Station for a purchase price of \$3.35 million. Upon signing, Nashville paid VSC a \$300,000 “deposit,” to be credited against the purchase price at closing. The APA also provides that, if Nashville, in coordination with VSC, did not initiate filing a Commission assignment application within one year of the APA’s signing date, it was to pay a second cash deposit of \$150,000 (together, “Deposits”), also credited against the purchase price.⁷ The APA stipulates that VSC will keep interest earned on the Deposits, regardless of the ultimate disposition of the Deposits themselves.⁸ In the event of a termination of the APA without a breach by either party, VSC would repay the entire amount of the Deposit.⁹ If VSC breached the agreement, Nashville would be entitled to return of the Deposit.¹⁰ If Nashville breached the agreement, VSC would keep the entire Deposit.¹¹

¹ In regard to the Renewal Application, VSC filed a Motion for Extension of Time and an Opposition on July 31, 2012, and August 8, 2012, respectively. Friends filed a Motion for Extension of Time on August 13, 2012, and a Reply on August 23, 2012. Nashville filed its Objection on September 25, 2012, and VSC filed its Petition on September 26, 2012. We grant the consent motions by both parties and consider the VSC Opposition and Friends’ Reply.

² MPA at § 1(a) and 1(a)(a).

³ *Id.*

⁴ *Id.* at § 1(c).

⁵ *Id.* at § 6.

⁶ *Id.* at § 5(a).

⁷ APA at §§ 2(b) and 5(b). The APA was signed on June 7, 2011, and the Assignment Application was filed on August 8, 2012, so we assume that the second cash deposit was paid.

⁸ *Id.* at § 2(b).

⁹ *Id.* § 19(d)(1).

¹⁰ *Id.* § 19 (d)(ii).

¹¹ *Id.* at §§ 19(d)(iii). This is VSC’s sole remedy. *Id.*

Renewal Application. Pleadings. Renewal Petition. On March 26, 2012, VSC timely filed the Renewal Application. In the July 2, 2012, Renewal Petition, Friends asks the Commission to designate for hearing the Renewal Application or defer action on it until VSC withdraws the purchase agreement or until VSC makes a formal application for assignment.¹² Friends states that it was injured by the loss of Station programming and culture which served as a resource for artists, a platform from which to launch careers, and a community voice.¹³

In support of its challenge to the Renewal Application, Friends alleges that: (1) VSC's Board violated its charter and acted *ultra vires* by signing the MPA because the VSC Charter of Incorporation sets forth only one purpose – the “operation, publication, and dissemination of student communication media at Vanderbilt University” -- and does not allocate to VSC the catchall power to engage in “things necessary and proper” and does not authorize the “piecemeal sale of assets;”¹⁴ (2) VSC did not have power to authorize the MPA because, due to reported and unreported “substantial” and “abrupt”¹⁵ Board changes between August 27, 2004, and March 26, 2012, VSC violated Section 310(d) of the Communications Act of 1934, as amended (“Act”), and the mandate that substantial changes in NCE governing boards must be approved on FCC Form 315;¹⁶ (3) the Deposits violate Section 73.503(c) of the Rules, as applied in *University of San Francisco* (“USF”), because they constitute consideration for the sale of air time;¹⁷ (4) the MPA constitutes an unapproved transfer of control, a violation of Section 310(d) of the Act, because¹⁸ VSC no longer sets “policy or practice in any way,” as exemplified by the MPA’s “outlandish provision” allowing Nashville to withdraw if VSC unreasonably interferes with management or programming;¹⁹ and (5) the Commission cannot find that VSC acted in the public interest for purposes of Station license renewal²⁰ during the last renewal cycle because it is contractually obligated to sell to

¹² Renewal Petition at 1.

¹³ *Id.* at Attachment B, Slomowicz Declaration at 1.

¹⁴ Renewal Petition at 6.

¹⁵ *Id.* at 8, citing *Transfers of Control of Certain Non-Stock Entities*, Notice of Inquiry, 4 FCC Rcd 3403, 3408 (1989) (“*Transfers of Control*”).

¹⁶ *Id.* at 12-13 and Attachment A. Friends cites several incidences of unreported Board turnover that, it claims, undercut the Board’s authority and amount to an unapproved transfer of ownership, in violation of Section 309(b) of the Act and Section 73.3540 of the Rules. Specifically, Friends alleges that VSC replaced five of eight voting board members between August 2004 and August 2005 (Renewal Petition at 11-12); four of eight voting members between August 2005 and September 2006; and the same between August 2007 and 2008. Renewal Petition at 12-14. Friends acknowledges, however, that between March, 2010, and August, 2010, VSC reported a 55.5 percent turnover on a minor change FCC Form 316 (File No. BTCED-20100826AFX granted on September 9, 2010), and then, in the ten months between September 22, 2010, and July 14, 2011, VSC similarly reported a 50 percent change in Board membership on an FCC Form 316 (File No. BTCED-20110704ADH, granted on August 25, 2011). *Id.* at 10-12.

¹⁷ *Id.* at 15-18, citing *University of San Francisco*, Order, 27 FCC Rcd 5674, 5674 (MB 2012) (finding that both assignor and assignee violated 47 C.F.R. § 1.17, and assignor violated 47 C.F.R. § 73.503(c)).

¹⁸ Renewal Petition at 18.

¹⁹ *Id.* at 20-21 citing MPA at § 3(b) (emphasis in Renewal Petition), citing as precedent *Birach Broadcasting Co.*, Notice of Apparent Liability for Forfeiture and Order, 25 FCC Rcd 2644, 2645 (EB 2010); *James A. Kay*, 396 F.3d 1184, 1188 (D.C. Cir. 2005) and *K.I.D.S.-TV6*, Notice of Apparent Liability, 15 FCC Rcd 20212 (EB 2000), *aff’d*, Forfeiture Order, 16 FCC Rcd 5495 (EB 2001).

²⁰ 47 U.S.C. §309(a).

another entity.²¹ Friends concludes that Nashville violated the Rules by entering into an MPA under which it assumed full control of the Station and violates policies applicable to such agreements. Friends argues that the MPA here is similar to the one at issue in *USF*, where the Bureau sanctioned both assignor and assignee.²² Given those alleged similarities, Friends recommends the Bureau sanction Nashville and conclude that it is unfit to be assignee.²³

VSC Opposition. In opposition, VSC claims that Friends lacks standing to file a petition to deny in this proceeding because its injury cannot be redressed by the remedy requested in the Renewal Petition; it claims that the Commission's scope of review in renewal proceedings does not reach agreements such as the MPA or the APA; and Friends does not present any argument that logically supports the notion that it could be made whole through denial of the Renewal Application.²⁴

Substantively, VSC claims that the Board's actions are not *ultra vires* because its charter authorizes it to enter into agreements such as the MPA. It quotes the charter as authorizing VSC to "receive property, real, personal or mixed, by purchase, gift, devise or bequest, *sell the same* and apply the proceeds toward the promotion of the objects for which it was created, or hold any such property and apply the income and profits towards such objects."²⁵ Overall, VSC argues that, in any event, the Commission does not engage in debates about the legitimacy of corporate status or actions under state law.²⁶

VSC claims that failure to report the Board's turnover is not a Rule violation. First, it argues that Friends misinterprets and incorrectly relies upon *Transfers of Control* because, as a mere Notice of Inquiry, it is a proposed guideline, not a rule.²⁷ Even were it a codified rule, VSC claims, such rule would not apply to VSC's "gradual" Board changes for a "membership organization" such as VSC. VSC also claims that, even if its Board changes were considered to be "sudden" as opposed to gradual, they do not affect the continuing, basic, nature of the entity itself, as required in *Transfers of Control*. Thus, VSC argues that, even if *Transfers of Control* were applied here, VSC would not need to file any application related to its Board membership changes because there has always been continuity of control. The "shifts" in Board membership, VSC avers, "have never evinced a coup or an effort by a certain faction or outside party to take control of the corporation,"²⁸ because Vanderbilt University always has been and remains the sole member of VSC.²⁹ Finally, VSC underscores that the Commission decides such matters on a case-by-case basis.³⁰

²¹ Renewal Petition at 22.

²² *USF*, 27 FCC Rcd at 5674.

²³ Renewal Petition at 26.

²⁴ Renewal Opposition at 3.

²⁵ *Id.* at 4-5 (emphasis in original) and Exhibit 1, Memorandum Of Thomas J. Sherrard, Esq. ("Sherrard Letter") (arguing that, under Tennessee law, the commitment of VSC's Board to the proposed sale of the Station is not *ultra vires* and Vanderbilt University is not required to approve the proposed sale by VSC to Nashville).

²⁶ Renewal Opposition at 5-6 citing *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17855 (1997), and *Abundant Life, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 4972, 4974 (2001).

²⁷ Renewal Opposition at 7, citing *Transfers of Control*, 4 FCC Rcd at 3408.

²⁸ Renewal Opposition at 10.

²⁹ *Id.* VSC underscores that "the basic core ownership structure and governance mechanisms have remained constant." *Id.*

³⁰ *Id.*, citing *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 442 (D.C. Cir. 1985).

Regarding claims of an unauthorized transfer of control, VSC highlights that the MPA grants it “supervision and control” over Nashville,³¹ and it maintains its own oversight of personnel, programming, and finances. VSC argues that it is not “outlandish” to include a clause in the MPA that terminates the agreement if VSC interferes with management or programming; it is a safety valve provision found in many contracts, allowing a party the right to withdraw.³² As evidence that it maintains control, VSC submits a declaration from Chris Carroll, Director of Student Media for VSC, indicating that he frequently communicates and conferences with staff of Nashville about programming to ensure adequate supervision. He indicates that VSC maintains its own oversight of personnel, programming, and finances and maintains a fully rule-compliant main studio for the Station, complete with staffing and technical capabilities. He further states that VSC operates a stand-alone Internet program stream produced at the main studio that could take over complete broadcast operations if need be.³³

In answer to Friends’ contention that the Commission cannot find for renewal purposes that VSC acted in the public interest, VSC claims that the obligation to sell to Nashville is not an obstacle to license renewal. It argues that the Commission “routinely” grants renewal applications for stations changing hands.³⁴

In response to allegations of a Section 73.503 violation, VSC says that without “first hand evidence of actual conduct” there is no reason for the Commission to indulge in Friends’ speculation about what it believes lies beyond the words of the APA and MPA.³⁵ VSC submits the Carroll Declaration as a first hand, sworn account to support its claim, as Carroll was reportedly “involved in the thick” of the sale negotiations.³⁶ Carroll states that Nashville had asked for “a holding period” between purchase agreement execution and closing, and VSC “felt that it should be compensated for waiting.”³⁷ Accordingly, Carroll states, Nashville agreed to compensate VSC for the wait.³⁸

Renewal Reply. Friends claims, in regard to *ultra vires* acts by the VSC Board, that the charter language cited by VSC is mere “boilerplate”³⁹ and, even if considered, does not override the more specific statement that requires all “means, assets, income or other property” to be “employed, directly or indirectly” in accomplishing “legitimate means of its creation.”⁴⁰ Friends states that the only “express purpose” for which VSC was created was to publish and disseminate student communication media at Vanderbilt University, not to sell the Station.⁴¹ Friends challenges the Sherrard Letter’s conclusions and

³¹ Renewal Opposition at 7.

³² *Id.* at 18.

³³ *Id.* at 18 and Exhibit 2, Declaration of Chris Carroll (“Carroll Declaration”) at 1.

³⁴ Renewal Opposition at 21. For example, VSC cites *Roger Williams University*, Order, 25 FCC Rcd 2710 (MB 2010) and File No. BALFT-20111026AEY. *Id.* at 22.

³⁵ Renewal Opposition at 14.

³⁶ *Id.* at 16.

³⁷ Carroll Declaration at 1-2.

³⁸ *Id.* Carroll emphasizes that the payments were not intended as compensation for airtime. Carroll Declaration at 2.

³⁹ Renewal Reply at 4.

⁴⁰ *Id.*

⁴¹ *Id.*

attempts to distinguish the facts here from the cases Sherrard cites. It argues that, while the Sherrard Letter may accurately characterize state law, it is irrelevant to the central argument: that under Tennessee Law, a decision by a nonprofit corporation to sell “substantially all” of its assets must be approved by the members.⁴² Here, Friends states, Vanderbilt University is the sole member of VSC, and it has not given such approval.⁴³ Friends claims that the Commission has examined State law and observed that “a corporation’s existence can be a relevant Commission inquiry,”⁴⁴ and that compliance with state law certainly is a relevant concern here.⁴⁵

In regard to the alleged Rule violation for unauthorized transfer of control, Friends claims the Commission has adopted “general guidelines” to provide certainty in assessing control questions.⁴⁶ It agrees with VSC that the Commission decides such cases on a case-by-case basis and cites the Instructions to FCC Form 316, but argues that the VSC Board of Directors underwent two majority changes -- between March and August of 2010 and between August of 2010 and August of 2011 -- each of which should have triggered the filing of an FCC Form 315. Furthermore, Friends states that an independent discrete facility is not, “by itself” indicative of ultimate control.⁴⁷ It claims the Carroll Declaration is “narrowly drafted, legalistic and uncorroborated...unaccompanied by exhibits or other supporting drafts.”⁴⁸

Finally, Friends claims that VSC’s examples of situations in which the Commission has granted a renewal application slated for assignment are “factually distinguishable” from this situation because those cases did not involve licensees who “prematurely abandoned control of station operations or routinely violated Commission Rules and both were uncontested.”⁴⁹

Discussion. A petition to deny a license renewal application must, pursuant to Section 309(d) of the Act,⁵⁰ provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(k) of the Act,⁵¹ which governs our evaluation of an application for license renewal. Specifically, Section 309(k)(1) provides that we are to grant the renewal application if, upon consideration of the

⁴² *Id.* at 5.

⁴³ *Id.* at 5-6. Finding that the issue of proper action or ratification hinges on whether the sale of the Station constituted a sale of “substantially all” assets, Friends then attempts to distinguish the Sherrard Letter’s discussion of similar language interpreted under the laws of the State of Delaware; it concludes that notwithstanding what may be the law in Delaware, the sale here is of “substantially all” assets because “it involves a most important asset within the core mission and a Core Division.” *Id.* at 6.

⁴⁴ Renewal Reply at 6-7 citing *Pacifica Foundation*, 36 FCC 2d 147 (1964) cited in *Black Television Workshop*, Memorandum Opinion and Order, 6 FCC Rcd 6525 at 6526 (1991).

⁴⁵ Renewal Reply at 6, citing *Blue Lake Academy, Inc.*, Letter, 20 FCC Rcd 12066 (MB 2005) (“*Blue Lake*”).

⁴⁶ Renewal Reply at 7.

⁴⁷ *Id.* at 10.

⁴⁸ *Id.*

⁴⁹ *Id.* at 11-12.

⁵⁰ 47 U.S.C. § 309(d).

⁵¹ *Id.*, § 309(k). See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n. 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh’g denied* (D.C. Cir. Sept. 10, 1993).

application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations that, taken together, constitute a pattern of abuse.⁵² If, however, the licensee fails to meet that standard, the Commission may deny the application, after notice and opportunity for a hearing under Section 309(d) of the Act, or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”⁵³

Procedural Issue: Standing. The Commission accords party-in-interest status to a petitioner who demonstrates either that he/she resides in the service area of the station that is the subject of the petition or that he/she listens to or views the station regularly and that such listening or viewing is not the result of transient contacts with the station.⁵⁴ To do so, the petitioner must provide an affidavit or declaration that establishes such standing.⁵⁵ The Commission has permitted organizations to establish standing provided that the affidavit of the organization’s member fulfills these requirements.⁵⁶ Here, the Slomowicz Declaration, sworn under penalty of perjury, states that many of the members of Friends reside within the service area of the Station and all members of Friends “are listeners or former listeners” of the Station’s programming.⁵⁷ Accordingly, Friends has listener standing to file the Renewal Petition.

Substantive Issues: *Ultra Vires* Acts. Friends claims that the Board’s adoption of the APA and MPA violated its powers as set forth in its charter and was *ultra vires*. Whether the Board did so is a matter of state corporate law. The Commission generally will not deny an application based on a licensee or permittee’s non-compliance with state corporate law “where no challenge has been made in the State

⁵² *Id.*, § 309(k)(1). The renewal standard was amended to read as described in the text by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

⁵³ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

⁵⁴ See *Tabback Broadcasting Company*, Memorandum Opinion and Order, 15 FCC Rcd 11899, 11900 n. 3 (2000) citing *Maumee Valley Broadcasting, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3487, 3488-3489 (1997), as modified by *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041 (1999). (discussing how the Commission amended party in interest requirements to include a petitioner who demonstrates either that it is a resident of the station’s service area or that the petitioner listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station).

⁵⁵ See *Infinity Broadcasting Corp. of California*, Memorandum Opinion and Order, 10 FCC Rcd 9504, ¶ 10 (1995) citing *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, Memorandum Opinion and Order, 82 FCC 2d 89, 99 (1980) (discussing the affidavit requirements for organizational standing); see also *Niles Broadcasting Company*, Memorandum Opinion and Order, 7 FCC Rcd 5959, 5959 (1992) (finding organization lacked standing for failure to establish in affidavit that a member had party-in-interest status).

⁵⁶ See *Hispanic Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 18834, 18835 n.4 (2003) (affidavit of organization’s president stating that he resided within the service area of one of 65 radio station licenses that sought to be transferred was sufficient to demonstrate standing to challenge the entire transaction); *AMFM, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 16062, 16077 (2000) (same individual’s declaration established organization’s standing to challenge AMFM/Clear Channel merger); see also *Adelphia Communications Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 8302 (2006) (declarations of Free Press Policy Director and National Hispanic Media Coalition President that, *inter alia*, their members resided in areas served by Comcast, Time Warner Cable, and Adelphia established organizations’ standing to challenge proposed acquisition of Adelphia by Comcast and Time Warner).

⁵⁷ Slomowicz Declaration at 1.

courts and the determination is one that is more appropriately a matter of State resolution.”⁵⁸ Friends argues that we addressed corporate existence in *Blue Lake*, and whether the Board complied with state law is an equally important concern here. However, we did not analyze or interpret state law in that case; rather, we simply referred to the state database of corporations to verify the existence of the applicant as a corporation recognized by state law because the applicant applied as a corporation in the LPFM filing window.⁵⁹ Moreover, we did so because the applicant’s corporate status was a threshold eligibility requirement set forth in the Rules and the Act.⁶⁰ Here, the question is the scope of the Board’s power as bestowed in the corporate charter, not whether applicant was or was not recognized by the state as a legal entity for purposes of eligibility under the Rules and the Act. Additionally, Friends offers no evidence of any action in state courts regarding VSC’s compliance with corporate laws. This is a question appropriately left to local courts of appropriate jurisdiction. Accordingly, this argument requires no further discussion.

Reported and Unreported Board Turnover. Friends alleges that VSC’s Board lacked authority to enter into the MPA because it failed to timely and accurately report its majority control changes. The question of whether VSC’s board lacked authority to enter into the MPA is a matter of state law that we will not address for the reasons discussed above. However, compliance with Section 310(d) of the Act is directly relevant to our Section 309(k) analysis and therefore will be considered.

In the *Transfers of Control* proceeding, the Commission proposed that if the Board of a membership organization or governmental entity underwent a gradual, yet “ultimately” majority change, it would need only be reported as appropriate on the licensee’s ownership reports.⁶¹ Because the *Transfers of Control* proceeding was merely a Notice of Inquiry and the proposals there were never codified into the Rules or adopted by the Commission,⁶² we have not formally adopted standards for what constitutes a change in control of a non-stock NCE entity that would require prior Commission approval on a long-form FCC Form 315.⁶³ Because Friends has not provided any evidence that undercuts VSC’s showing with respect to changes in the VSC Board, we accept VSC’s explanation that there has always been continuity of control, that the Board membership changes “have never evinced a coup or an effort by

⁵⁸ *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17855 (1997)) (citing *North American Broadcasting Co., Inc.*, 15 FCC 2d 979 (1969)).

⁵⁹ *Id.* See also *Hammock Environment and Educational Community Services*, Letter, 25 FCC Rcd 12804, 12807 (MB 2010) (“Confirming [applicant’s] eligibility does not, contrary to [its] protests, require us to interpret Florida law. Rather, the purpose of our inquiry was to determine whether [applicant] took the requisite steps to receive recognition from the State of Florida prior to filing its Application.”).

⁶⁰ *Blue Lake*, 20 FCC Rcd at 12068-69 (addressing the corporate existence of a low power FM applicant because the Rules required such applicants to certify eligibility upon application).

⁶¹ *Transfers of Control*, 4 FCC Rcd at 3408. A sudden change in the majority of the governing board, however, would be considered an insubstantial transfer of control, subject to “modified [Form 316] short form” consent procedures. *Id.* Here, apart from the two “short form” FCC Form 316 applications VSC filed in 2010 and 2011, see note 16, *supra*, VSC filed timely Ownership Reports (File Nos. BOA-20040401ATM; BOA-20060321ADA; BOA-20080303ACM; BOA-20100302AAQ; and BOA-20120326AEX), each of which reported relevant Board changes.

⁶² See, e.g., *Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912, 21921 (2007) (“We will apply the *Non-Stock Transfer NOI* to appropriate LPFM licensees, and thus, will interpret a sudden change of a governing board’s majority as an insubstantial transfer for which approval must be sought on an FCC Form 316 (“short form”) broadcast application.”)

⁶³ See, e.g., *Texas Educational Broadcasting Co-operative*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 13038 (MB 2007) (rejecting allegation of unauthorized transfer of control of non-profit board of directors that experienced incremental changes due to two-year terms of directors).

a certain faction or outside party to take control of the corporation,”⁶⁴ and that Vanderbilt University, as the sole member of VSC throughout the period in question, has provided consistency in basic core ownership structure and governance mechanisms.⁶⁵ In light of these showings, there is no basis for finding a violation of Section 310(d) due to the changes in the composition of the VSC Board between August 27, 2004, and March 26, 2012.

Sale of Program Time. Next, Friends alleges that the MPA and the APA, read together, violate Section 73.503(c) of the Rules, which prohibits radio stations from selling program time for a profit.⁶⁶ Friends claims that the Deposits act like a purchase of airtime (*e.g.*, VSC keeps the interest on the Deposits and, in the event of breach, may keep the Deposits), and VSC keeps the interest on the Deposits.⁶⁷ VSC counters that the Deposits compensated VSC for the waiting period before consummation.⁶⁸ In *USF* the contract was, on its face, contrary to the Rules because parties exchanged a direct, regular, monthly payment (plus reimbursement of operating expenses) in exchange for broadcasting time. Here, the Deposits are a credit towards the purchase price, do not appear to be related in any way to the Station’s programming, and lack the built-in profit scheme of the *USF* arrangement because they are not paid unconditionally. The Friends argument fails to recognize that the MPA and the APA are separate contractual arrangements with no cross-default provision. For example, if VSC breached the MPA and refused to allow Nashville to provide programming to the Station, that would not affect the treatment of the Deposits under the APA. Similarly, the APA provides that VSC is entitled to keep all of the accrued interest on the Deposits under any scenario, regardless of what may happen with the MPA. Accordingly, we find that this case is not analogous to the *USF* case, where there was a direct contractual link between programming rights and payments in excess of operating expenses. Accordingly, we reject this argument.

Transfer of Control in the MPA. Friends claims that the MPA is a “total relinquishment of control” by VSC, unapproved by the Commission, in violation of Section 310(d) of the Act, which prohibits the transfer of control of a station license, and any rights thereunder, without prior Commission consent.⁶⁹ Friends claims that, notwithstanding provisions in the MPA that preserve a level of theoretical control by VSC over the Station, in reality VSC has abdicated control of the Station to Nashville through

⁶⁴ Renewal Opposition at 10. Friends offers evidence of majority Board changes but does not speak to the issue of internal control. We also note that VSC Bylaws state that three faculty voting board members shall serve three-year terms and five student representatives shall serve two-year terms. Petition at Exhibit B, Vanderbilt Student Communications Bylaws. Given that the majority of the Board is on two-year cycles, the turnover appears more a result of term expiration than a take-over attempt.

⁶⁵ Renewal Opposition at 10. *See also Seven Locks Broadcasting Co.*, Hearing Designation Order, 94 FCC 2d 899, 902 (1983) (in the licensing context, declining to find evidence of a transfer of control partly because of timely and accurate ownership report filings, indicating good faith).

⁶⁶ Renewal Reply at 9. 47 C.F.R. § 73.503(c) provides that an NCE FM station may broadcast programs produced by (or at the expense of, or furnished by) a third party if the licensee receives no consideration other than the programming and the costs incidental to the production and broadcast of the programming. In the *USF* case, the Consent Decree among the Bureau and the parties found a violation of the rule occurred because a programmer reimbursed the licensee’s operating expenses and also paid the licensee a fee of several thousand dollars a month to air its programming. *See* 27 FCC Rcd at 5677.

⁶⁷ Renewal Petition at 17.

⁶⁸ Renewal Opposition at 15-16.

⁶⁹ Renewal Petition at 18, citing 47 U.S.C. § 310(d). Friends’ transfer of control argument is based entirely on the terms of the MPA and does not rely on any extrinsic evidence involving the conduct of the parties.

that agreement. In ascertaining whether a transfer or reversion of control has occurred, the Commission traditionally looks beyond legal title to whether a new entity or individual has obtained the right to determine the basic operating policies of the station.⁷⁰ Specifically, the Commission looks to three essential areas of station operation: programming, personnel, and finances, as well as an independent operating presence at the station separate from the new entity or individual.⁷¹ We find that the MPA complies with the Commission's policies for time brokerage agreements in all respects.

With respect to programming, the MPA indicates that, although Nashville will program the Station 24 hours per day, seven days per week, the programming aired by Nashville is to comply specifically with VSC's program standards; Nashville will not change the agreed-upon format without VSC's approval; VSC can "easily" resume programming the Station using a digital stream that is being distributed via the Internet and produced in VSC's studio facilities at the main studio location;⁷² and VSC can preempt or reject any programming if VSC reasonably concludes it is not in the public interest or that "alternate programming would better address local needs."⁷³ Any listener complaints or Commission inquiries regarding programming aired on the Station are to be referred to VSC, although Nashville will cooperate in preparing a response.⁷⁴ VSC also retains the right to terminate the MPA immediately upon written notice if, in the exercise of reasonable good faith, it finds that Nashville is operating the Station in a manner contrary to the public interest.⁷⁵

Friends places great weight on Nashville's termination rights under the MPA. Friends argues that it is "outlandish" to give Nashville the ability to terminate the MPA if VSC "unreasonably frustrates or impedes effective management and programming of the Station by [Nashville]."⁷⁶ We disagree, because such a termination would not involve a significant financial penalty to VSC.⁷⁷ A termination by Nashville under this provision of the MPA would not jeopardize VSC's rights under the APA, including its rights to the Deposits. Instead, such a termination would only mean that VSC would remain responsible for operating the Station as long as it owns the Station, consistent with its obligations as a licensee. In the context of a \$3.35 million sale transaction, Friends has not shown that this outcome represents a financial penalty that is likely to influence VSC's decisions as the licensee of the Station prior to closing. In fact, this provision appears to recognize that VSC's exercise of its prerogatives as the licensee of the Station

⁷⁰ See *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

⁷¹ See, e.g., *Stereo Broadcasters, Inc.*, Decision, 87 FCC 2d 87 (1981), *recon. denied*, 50 R.R.2d 1346 (1982).

⁷² *Id.* We reject Friends' claim that this situation is like the transfer of control in *K.I.D.S.-TV6*, as that situation involved complete relinquishment of licensee's power, policymaking, and oversight capability. *KIDS-TV6*, Notice of Apparent Liability, 15 FCC Rcd 20212 (EB 2000), *aff'd*, Forfeiture Order 16 FCC Rcd 5495 (EB 2001). Similarly, we find no merit to the argument that *James A. Kay* supports Friends' position, as almost none of the six factors cited by the court as the factors it used to find a transfer of control are present here. See *James A. Kay*, 396 F.3d 1184, 1188 (D.C. Cir. 2005).

⁷³ *Id.* See also MPA Attachment 1: Statement of Station Policies of Licensee.

⁷⁴ MPA at § 1(a)(a).

⁷⁵ *Id.* at § 3(a).

⁷⁶ Renewal Petition at 18, citing MPA §3(b).

⁷⁷ See Instructions for FCC Form 314, Worksheet 3, Page 11, Question D.3(b) (if a time brokerage agreement imposes an excessive fee or penalty upon a licensee for termination, it may not comply with Commission precedent and an explanatory exhibit is required to explain why the agreement does not constitute an unauthorized transfer of control).

while the MPA is in effect could frustrate Nashville's objectives under the MPA, to the point that Nashville would want to terminate the MPA and play no role at the Station until closing under the APA. Accordingly, we disagree that Nashville's termination rights under the MPA demonstrate a transfer of control.⁷⁸

In regard to personnel, the MPA states that VSC bears "full responsibility for the hiring, firing and compensation of the Station employees on [VSC's] payroll."⁷⁹ Friends argues that Nashville "is authorized to hold itself out" as manager and operator of the Station and enter into contracts "in connection with its operation of the Station in the ordinary course of business."⁸⁰ However, the MPA limits Nashville's authority by stating that the contractual relationship is not one of joint venture or partnership,⁸¹ and Carroll states that he periodically consults with and oversees Nashville management.⁸² Furthermore, VSC maintains the authority "to promulgate basic Station policies regarding personnel" and "direct the day-to-day activities of [Nashville's] employees working at the Station to the extent necessary for the Station to comply with all legal requirements."⁸³

As for finances, Carroll states that VSC maintains the finances and pays from its own funds transmitter site rental, utilities, personnel, contract engineering services and legal representation.⁸⁴ Friends argues that the MPA delegates fundraising, financial recordkeeping and grant application to Nashville.⁸⁵ Indeed, the MPA states that Nashville "shall keep financial and accounting records of the Station's activities...."⁸⁶ However, the MPA entitles VSC to conduct inspections; mandates periodic financial reports; requires all grants to go through VSC review and approval; and fundraising is to be conducted "in continuing consultation with Licensee."⁸⁷ Accordingly, we find that VSC has maintained control because it reserved ultimate responsibility for the Station's operation in all significant respects.

Public Interest Obligations. Section 309(k)(1)(a) of the Act requires the Commission to find that the licensee operated the station in the public interest.⁸⁸ Friends argues that we cannot grant the renewal application because VSC did not meet the required public interest obligations during the portion of the

⁷⁸ See *Paramount Stations Group of Kerrville, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 6135 (1997), and Appendix, 12 FCC Rcd at 6146 (Commission approves assignment of television station license where an amendment to the termination clause in the time brokerage agreement gives both parties equal rights to terminate the agreement, subject to paying specified damages of \$1,000,000, representing approximately 3% of the sale price); *Rocking M Radio, Inc.*, Letter, 25 FCC Rcd 1322, 1328 (MB 2010) (litigation over actual damages for breach of a time brokerage agreement does not present the same transfer of control concern as a provision imposing excessive penalties on a licensee for breach or termination).

⁷⁹ MPA at §1(c).

⁸⁰ *Id.* at §13.

⁸¹ *Id.*

⁸² Carroll Declaration at 1 ("I communicate frequently with the management and staff of Nashville Public Radio...").

⁸³ MPA at §14.

⁸⁴ Carroll Declaration at 1.

⁸⁵ Renewal Petition at 19.

⁸⁶ MPA at §12.

⁸⁷ *Id.* at §4(a) and (b).

⁸⁸ 47 U.S.C. § 309(k)(1)(a).

license term that Nashville managed the Station and because it is contractually obligated to sell the Station to Nashville. VSC states that there is no prohibition against renewing the license of a Station that is under a sales contract because that contract does not change the renewal standards set forth in Section 309(k) of the Act. We agree. In fact, where assignment and renewal applications are both pending for a station, the Commission generally will not act on the assignment application until it has granted the renewal application, and the Commission has granted contested renewal and assignment applications where petitioner has failed to establish a *prima facie* case for premature and unauthorized transfer of control.⁸⁹ Accordingly, this allegation is meritless.

Conclusion Regarding License Renewal Application. We have examined the Renewal Petition and find that it does not raise a substantial and material question of fact calling for further inquiry or otherwise persuade us that to grant the Renewal Application would contravene the public interest, convenience, and necessity. Accordingly, we deny the Renewal Petition. Moreover, we have evaluated the Renewal Application pursuant to Section 309(k) of the Act, and we find that the Station has served the public interest, convenience, and necessity during the subject license term; there have been no serious violations of the Act or the Rules; and there have been no other violations which, taken together, constitute a pattern of abuse. We therefore will grant the Renewal Application below.

Assignment Application. Pleadings. Assignment Objection. On August 8, 2012, VSC filed the Assignment Application. In the Assignment Objection, styled as a Petition to Deny, Friends asks that the Commission delay action on the assignment until it addresses issues raised in the Renewal Petition, namely: (1) that the MPA violated Section 73.503 of the Rules in light of the *USF* holding; (2) the Board, due to major sudden changes, some unreported to the Commission, lacked authority to enter into this sale agreement; (3) State law required a ratification of the sale by the sole member of the entity, and this was not done; and (4) Nashville violated Commission Rules by entering into the MPA under which Nashville assumed full control of the station.⁹⁰

Assignment Oppositions: Nashville. Nashville claims that the Assignment Objection does not meet the requirements of Section 309(d) of the Act because it merely incorporates Friends' arguments as set forth in its Renewal Petition and is unsupported by affidavits of personal knowledge;⁹¹ it claims that Friends has raised in the Assignment Objection no allegations either that VSC lacks the qualifications to assign the station or that Nashville is not qualified to hold the Station license. Accordingly, Nashville states that the Commission should dismiss the Assignment Objection, deny the Renewal Petition, and grant the Renewal and Assignment applications. Substantively, Nashville argues that the Deposits are "customary and appropriate consideration for the purchase of the station,"⁹² a usual "down payment" found in "virtually all" broadcast station sales and reflect the time value of money.⁹³ It also states that the MPA was "very carefully crafted" to comply with Commission requirements, particularly licensee control requirements, and Friends has made no allegations that the parties have violated the terms of the MPA, arguing instead that the execution of the MPA is a "per se" unauthorized transfer of control.⁹⁴

⁸⁹ *WVKO(AM), Columbus, Ohio*, Letter, 28 FCC Rcd 126 (MB 2013).

⁹⁰ Assignment Objection at 1-2.

⁹¹ Nashville Assignment Objection Opposition at 1-2.

⁹² *Id.* at 4 (emphasis in original).

⁹³ *Id.* As evidence of this, Nashville argues, there is no refund or credit flowing back to it in the event of a termination, and the contractual provisions reserve control of basic operating policies (personnel, programming and finances) for VSC. *Id.*

⁹⁴ *Id.* at 4.

Additionally, Nashville claims that there is no prohibition against renewing the license of a Station that is under a sales contract because the pendency of a sale does not change the renewal standards set forth in Section 309(k) of the Act.⁹⁵

VSC. VSC alleges that Friends does not have standing to file the Assignment Objection because it fails to provide any evidence that it is a party in interest, and does not include an affidavit of a person or persons with personal knowledge of the facts and allegations in the Assignment Objection.⁹⁶ VSC claims that the Assignment Objection is deficient because, while referencing its arguments, it fails to attach, repeat, or incorporate by reference the arguments it made in the Renewal Petition. VSC attaches and incorporates by reference its Opposition to Renewal Petition.⁹⁷

VSC again argues that the Commission should decline to consider the alleged *ultra vires* act, in deference to local authorities.⁹⁸ As for Board turnover, VSC argues that there is a great deal of ambiguity about what constitutes a transfer of control for a non-profit entity in cases where the turnover is gradual and in the ordinary course of business.⁹⁹ Here, according to VSC, the Board turnover it was “quiet and regular” as well as gradual,¹⁰⁰ did not involve a dispute, coup, merger or acquisition, and did not represent a fundamental change of course for the entity.¹⁰¹

Discussion. Pursuant to Section 309(e) of the Act, informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.¹⁰² The Assignment Objection does not carry that burden.

Procedural Issue. As an initial matter, we note that the Assignment Objection does not meet the requirements of 309(d) of the Act¹⁰³ because Friends did not provide an affidavit or declaration

⁹⁵ *Id.* at 5.

⁹⁶ VSC Assignment Objection Opposition at 1-2.

⁹⁷ *Id.* at 3.

⁹⁸ *Id.* at 4 citing *Blue Lake*, 20 FCC Rcd 12066. VSC claims that Friends’ reliance on *Blue Lake* is inapposite because the question of VSC’s corporate existence is not at issue here. In the interest of maintaining orderly pleading procedures, arguments raised in an opposition must respond to the petition. *See Susan S. Mulkey Koontz Communications Limited Partnership*, Memorandum Opinion and Order, 4 FCC Rcd 5520, 5522 (1989) (finding it “inappropriate to raise new issues in an opposition to an application for review.”); *Amendment of Section 73.202(B), Table of Allotments, FM Broadcast Stations*, Memorandum Opinion and Order, 6 FCC Rcd 4579, n.1 (MB 1001) (declining to consider new arguments raised in an opposition). Here, this argument responds to the Renewal Reply, not the Assignment Objection. Accordingly, we will not consider VSC’s rebuttal argument.

⁹⁹ VSC Assignment Objection Opposition at 5.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*, distinguishing *Black Television Workshop*, 6 FCC Rcd 6525 (1991), cited by the Renewal Reply. This argument also responds to an argument not raised in the Assignment Objection, *see* note 98. For the reasons stated therein, we will not consider it.

¹⁰² *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n. 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁰³ 47 U.S.C. § 309(d).

establishing its qualifications to file a Petition to Deny and only briefly touched on the many allegations in the Renewal Petition, noting only that it provided evidence in the renewal proceeding. Therefore, Friends has not established that it has standing to file the Assignment Objection. We will, however, treat it as an informal objection under Section 73.3587 of the Rules.¹⁰⁴

Substantive Issues. In the Assignment Objection, Friends claims that the objections and arguments it made in the Renewal Petition prove that an assignment would not be in the public interest. Considering all the evidence before us, as discussed above, Friends has raised no substantial and material question of fact that merits further inquiry regarding the Assignment Application. Further, we have examined the Assignment Application and find VSC qualified to assign, and Nashville qualified to hold, the Station license. Accordingly, we find that grant of the Assignment Application is in the public interest.

Conclusion/Actions. Accordingly, IT IS ORDERED, that the July 2, 2012, Petition to Deny and September 12, 2012, Informal Objection filed by WRVU Friends & Family ARE DENIED.

IT IS FURTHER ORDERED, that Vanderbilt Student Communications, Inc.'s application (File No. BRED-20120326AEY) for renewal of its license for Station WFCL(FM), Nashville, Tennessee, IS GRANTED.

IT IS FURTHER ORDERED, that the application (File No. BALED-20120808ABQ) for assignment of the WFCL(FM) license to Nashville Public Radio, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Mark J. Hetherington, Board Chair, Vanderbilt Student Communications, Inc.
Rob Gordon, President and General Manager, Nashville Public Radio