

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

In re Matter of)
)
KAXT, LLC)
(Assignor))
)
and)
)
OTA BROADCASTING (SFO), LLC)
(Assignee))
)
For Consent to Assign the License of Station)
KAXT-CD, San Francisco-San Jose, California)

File No. BALDTA-20130211ACT
Facility ID No. 37689

ACCEPTED/FILED

DEC 18 2017

**Federal Communications Commission
Office of the Secretary**

In re Application of)
)
OTA BROADCASTING (SFO), LLC,)
)
For Renewal of the License of)
Television Broadcast Station KAXT-CD,)
San Francisco-San Jose, California)

File No. BRDTA-20140731ANH
Facility ID No. 37689

TO: The Commission

**OTA BROADCASTING (SFO), LLC'S
OPPOSITION TO PETITION FOR RECONSIDERATION**

OTA BROADCASTING (SFO), LLC

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Dated: December 18, 2017

Executive Summary

The Petitioners here, Nalini Kapur, Rishi Kapur, and Ravi Kapur, are non-controlling investors in KAXT, LLC, the former licensee of KAXT-CD. Since 2013, the Kapurs have sought to use Commission processes first to block, and then to unwind, the sale of KAXT-CD by KAXT, LLC, to OTA — a transaction that an arbitrator and the California state courts repeatedly have concluded, in response to legal challenges by the Kapurs, was valid and enforceable.

The Video Division has rejected the Kapurs' factual allegations and legal theories on three separate occasions. Most recently, in a Memorandum Opinion and Order released on November 3, 2017 (the "MO&O"), a unanimous Commission denied the Kapurs' Application for Review of the Video Division's decisions. Now the Kapurs have asked the Commission to reconsider and reverse the MO&O.

It is settled law that "reconsideration will not be granted merely for the purpose of again debating matters on which the agency has once deliberated and spoken." Four times the Kapurs have objected to the assignment of KAXT-CD to OTA, and four times their arguments have been rejected — three times by the Video Division, and now by the full Commission.

As with all the Kapurs' prior multiple petitions for reconsideration, the instant Petition does not identify any errors of fact or law warranting reconsideration of the MO&O. Accordingly, the Petition should be dismissed or denied forthwith. Moreover, the time has come for the Commission to address — and put an end to — the Kapurs' continuing abuse of the Commission's processes in order to affect the outcome of their private contractual dispute with the majority owners of KAXT, LLC.

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TO: The Commission

**OTA BROADCASTING (SFO), LLC'S
OPPOSITION TO PETITION FOR RECONSIDERATION**

OTA Broadcasting (SFO), LLC (“OTA”), by its attorneys and pursuant to Section 1.106(b) of the Commission’s Rules, 47 C.F.R. § 1.106(b), hereby opposes the Petition for Reconsideration filed in the captioned matters on December 4, 2017 (the “Petition”), by Nalini Kapur, Rishi Kapur, and Ravi Kapur (collectively, the “Kapur”). The Kapurs are asking the Commission to reconsider and reverse its *Memorandum Opinion and Order*, FCC 17-145,

released on November 3, 2017 (the “MO&O”), denying the Kapurs’ Application for Review¹ of three previous Video Division decisions in these proceedings.² The Petition repeats allegations and arguments identical to those raised in the Application for Review (and, as will be shown below, in numerous other pleadings submitted by the Kapurs in these and other proceedings — including additional filings made while the Petition has been pending). The arguments raised in the Petition should be rejected yet again.

The Commission is thoroughly familiar with the facts and procedural history of the case and with the Kapurs’ misguided view of the world as reflected in their many pleadings over the last nearly five years. There is nothing new here: the Petition regurgitates the same allegations and legal arguments that the Kapurs have been making for years, and that have been rejected repeatedly — three times by the Video Division and once, more recently, by a unanimous Commission.

It is settled Commission precedent that “reconsideration will not be granted merely for the purpose of again debating matters on which the agency has once deliberated and spoken.”³ So OTA will not respond anew to the Petition’s meritless allegations and arguments,

¹ Nalini Kapur, Rishi Kapur, and Ravi Kapur, Application for Review in File Nos. BALDTA-20130211ACT and BRDTA-20140731ANH (filed January 11, 2016).

² See *KAXT, LLC (Assignor) 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, 29 FCC Rcd 8266 (Vid. Div. 2014) (disposing of the Kapurs’ “Petition to Dismiss, Deny, or, in the Alternative, Hold Application in Abeyance” and granting the assignment application in File No. BALDTA-20130211ACT); *KAXT, LLC (Assignor) 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, 30 FCC Rcd 2691 (Vid. Div. 2015) (disposing of Petitioners’ petition for reconsideration of the Video Division’s 2014 order and granting the license renewal application in File No. BRDTA-20140731ANH); and *KAXT, LLC (Assignor) 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, DA 15-1414 (Video Div. Dec. 11, 2015) (disposing of the Kapurs’ petition for reconsideration of the Video Division’s 2015 order).

³ *Knoxville Broad. Corp. on Request for Inspection of Records*, Memorandum Opinion and Order, 87 F.C.C.2d 1103, 1107 ¶ 11 (1981). See also 47 C.F.R. § 1.106(b)(2), which provides in pertinent part that a petition for (continued...)

and it is unfortunate that the Commission must now expend even more of its scarce resources than already have been consumed in these proceedings to date in order to reconsider — once again — the Kapurs’ identical allegations and arguments. OTA responded comprehensively in its opposition to the Application for Review that is the subject of the Petition, and OTA incorporates that opposition by reference and attaches it hereto for convenience.⁴

To the extent the Kapurs contend that reconsideration is warranted because certain “new” evidence in their possession pertaining to KAXT-CD’s maintenance of its political broadcasting file was unavailable to the Commission at the time it adopted the *MO&O*,⁵ the Petition repeatedly acknowledges that the Kapurs had presented that evidence to the Commission at least twice before the *MO&O* was issued and the Petition was filed.⁶ First, on June 9, 2017, in a pleading styled as a “Motion to Hold Incentive Auction Payment in Abeyance Pending Resolution of OTA Character Qualifications” directed to the Commission, the Kapurs sought to stay the payment of any incentive auction proceeds to OTA on the ground, among others, that the Kapurs possessed evidence relating to KAXT-CD’s political file and “[stood] ready to provide

reconsideration of the Commission’s denial of an application for review “will be entertained only if one or more of the following circumstances are present:

“(i) The petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; or

“(ii) The petition relies on facts or arguments unknown to 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.”

See also 47 C.F.R. § 1.106(b)(3) (“A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.”).

⁴ *See* OTA Broadcasting (SFO), LLC, Opposition to Application for Review, File Nos. BALDTA-20130211 ACT, BRDTA-20140731ANH (filed January 28, 2016) (attached hereto).

⁵ Petition at i, 2-3, 7-10.

⁶ *Id.* at 3, 8-9.

it.”⁷ Second, in another submission to the Commission a month later repeating their request that the Commission withhold incentive auction proceeds from OTA, the Kapurs renewed their political file allegations and submitted the “evidence” referred to in their previous filing.⁸ Curiously, in neither instance did the Kapurs seek to supplement or amend their Application for Review itself, even though the Commission has the authority to accept and consider supplemental filings that rely on new facts.⁹ But the Kapurs had the opportunity to (and in fact did through their subsequent filings) present these facts to the Commission prior to its adoption of the *MO&O*.¹⁰

Consequently, the Kapurs have failed to point to any “facts or arguments unknown” to them, as they must in order to justify their request that the Commission reconsider the *MO&O*.¹¹ And even if the Kapurs’ political file allegations do satisfy this standard — and, as the Kapurs’ repetition of those arguments shows, they do not — those allegations do not undermine the *MO&O*’s conclusions that the Video Division properly approved the assignment of license of KAXT-CD from KAXT, LLC, to OTA and, thereafter, OTA’s application for renewal of the license of KAXT-CD. To the extent the Kapurs’ political file allegations have

⁷ See Nalini Kapur, Rishi Kapur, and Ravi Kapur, Motion to Hold Incentive Auction Payment in Abeyance Pending Resolution of OTA Character Qualifications, File Nos. BALDTA-20130211 ACT, BRDTA-20140731ANH, at 5-8 (filed June 9, 2017).

⁸ See Nalini Kapur, Rishi Kapur, and Ravi Kapur, Submission of New Material Evidence Considering the Political File Practices of OTA Broadcasting (SFO), Acct. No. MB-201741410002, File No 161107 (filed July 21, 2017).

⁹ See *Blanca Tel. Co. Seeking Relief from the June 22, 2016 Letter Issued by the Office of the Managing Dir. Demanding Repayment of A Universal Serv. Fund Debt Pursuant to the Debt Collection Improvement Act*, Memorandum Opinion and Order and Order on Reconsideration, FCC 17-162, ¶ 27 (Dec. 8, 2017) (accepting two late-filed supplements to a pending application for review because they relied on new facts or arguments that the Commission deemed relevant to the proceeding).

¹⁰ OTA addressed the Kapurs’ allegations, among other matters, in a Compliance Report submitted on October 26, 2017, pursuant to Paragraph 16 of the Consent Decree entered in *Investigation into the Political File Practices of OTA Broadcasting (SFO), LLC*, Order, DA 17-89, 32 FCC Rcd 795 (2017). The matter is pending before the Policy Division.

¹¹ 47 C.F.R. § 1.106(b)(2)(ii).

merit, the Media Bureau's Policy Division should consider them in the first instance; certainly, they should not be the basis for reconsideration of the *MO&O*. Indeed, the Petition fails to identify a single instance where the Commission disapproved a license assignment, or refused to renew a license, on the basis of political file allegations like those made by the Kapurs here.

OTA believes the time has come for the Commission to address the Kapurs' conduct in these proceedings. The only salient facts for present purposes are that Nalini Kapur, Rishi Kapur and Ravi Kapur are non-controlling investors in KAXT, LLC, the former licensee of KAXT-CD, and that, since 2013, the Kapurs have sought to use the Commission and its staff in their efforts first to block, and then to unwind, the sale of KAXT-CD by KAXT, LLC, to OTA. Over that period of nearly five years, the Kapurs have submitted a relentless barrage of 20 substantially similar pleadings in five separate Commission proceedings — in the face of repeated denials in multiple thoughtful, well-reasoned decisions by the FCC staff and, now, by the full Commission itself. They have made *ad hominem* attacks on OTA's largest investor both before the Commission and in other venues.¹² They have sought to interfere with OTA's participation in the broadcast incentive auction and continue to seek to disrupt OTA's operation of its business well after the auction's completion.¹³

¹² See n.18, below; see also, e.g., Nalini Kapur, Rishi Kapur, and Ravi Kapur, Supplement To Petition To Dismiss, Deny, Or, In The Alternative, Hold Application In Abeyance & Supplement, BALDTA-20130211ACT, at 3 (filed Feb. 24, 2014) (alleging that Michael S. Dell, OTA's principal investor, was seeking to "strong arm and muzzle" the Kapurs "in service of OTA's apparent pursuit of a quick, *self*-interested incentive auction payday" (emphasis in original)).

¹³ See, e.g., Nalini Kapur, Rishi Kapur, and Ravi Kapur, Motion to Hold Incentive Auction Payment in Abeyance Pending Resolution of OTA Character Qualifications, File Nos. BALDTA-20130211ACT, BRDTA-20140731ANH (filed June 9, 2017) (seeking to stay payment of incentive auction proceeds to OTA's affiliates); Nalini Kapur, Rishi Kapur, and Ravi Kapur, Informal Objection, File No. BALCDT-20171101ACJ (filed Dec. 6, 2017) (objecting to grant of application for consent to assignment of license of KTLN-TV, Palo Alto, California, from OTA to TV-49, Inc.).

This history is especially noteworthy, and egregious, given the Kapurs' admitted basis for joining these proceedings in the first place: their view that the majority owners of KAXT, LLC, lacked authority to sell KAXT-CD to OTA — a sale that an arbitrator and the California state courts repeatedly and decisively concluded was valid and enforceable. Seen in this light, and as the record makes clear, the Kapurs want the Commission effectively to reverse the outcome of the arbitration and the related California court case and implicate itself in their private business dispute with their partners in KAXT, LLC. Even if the Commission had authority to adjudicate a private contractual dispute — which it does not¹⁴ — it must not allow its processes to be so flagrantly and cynically abused.

The catalogue of the Kapurs' filings at the FCC alone graphically illustrates their conduct of this case and paints a vivid picture of a rogue party abusing the Commission's processes in an improper attempt to pursue a commercial vendetta:

Date Filed	Proceeding	Filing	Claim
March 18, 2013	BALDTA-20130211ACT ¹⁵	Petition To Dismiss, Deny, Or, In The Alternative, Hold Application In Abeyance	Majority owners of KAXT LLC lacked authority to execute assignor's portion of KAXT-CD assignment application because the sale of KAXT-CD to OTA was invalid and unenforceable. ¹⁶

¹⁴ See, e.g., *Radio Carrollton*, 69 F.C.C.2d 1138, 1150 (1978) (contract questions “are matters for the courts to decide under state and local law,” and the Commission “normally defer[s] to judicial determinations regarding the interpretation and enforcement of contracts for the sale of broadcast stations”); *ComScape Commcn's, Inc. & East Kentucky Network, LLC*, 24 FCC Rcd 8645, 8647-48 (WTB 2009) Commission precedent recognizes that the resolution of private contractual disputes is both “outside the Commission’s jurisdiction” and “not necessary to [the Commission’s] evaluation of whether [an] assignment is in the public interest”). See also *Patrick Henry*, 69 F.C.C.2d 1305, 1312 (1978) (“The Commission traditionally has declined to intervene in matters of local law which best are settled by local forums having jurisdiction over such proceedings.”).

¹⁵ Application on FCC Form 314 for Commission consent to the voluntary assignment of license of KAXT-CD. San Francisco-San Jose, California, from KAXT, LLC to OTA Broadcasting (SFO), LLC.

¹⁶ Previously unasserted claims in each submission are italicized.

Date Filed	Proceeding	Filing	Claim
April 11, 2013	BALDTA-20130211ACT	Consolidated Reply to Oppositions	Majority owners of KAXT LLC lacked authority to execute assignor's portion of KAXT-CD assignment application because the sale of KAXT-CD to OTA was invalid and unenforceable. ¹⁷
October 22, 2013	BALDTA-20130211ACT	Response To Motion For Leave To File Supplement To Opposition To Petition To Dismiss, Deny, Or, In The Alternative, Hold Application In Abeyance	Opposing Assignor's submission of copy of arbitrator's ruling that sale of KAXT-CD was valid and enforceable. ¹⁸
February 24, 2014	BALDTA-20130211ACT	Motion For Leave To File Supplement To Petition To Dismiss, Deny, Or, In The Alternative, Hold Application In Abeyance & Supplement	<i>OTA's character qualifications implicated by demand letter from OTA following entry of arbitrator's award.</i>
May 19 2014	BALDTA-20130211ACT	Reply to OTA Comments and OTA Supplement to Comments	Opposing OTA's submission of copy of California superior court order affirming arbitrator's award. ¹⁹
August 11, 2014	BALDTA-20130211ACT	Petition for Reconsideration	Sale of KAXT-CD to OTA was invalid and unenforceable; Seller lacked authority to sign assignor's portion of KAXT-CD assignment application; OTA's demand letter following entry of arbitrator's award implicated OTA's character qualifications; <i>the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend applications to disclose the Kapurs' pending character allegations was unlawful.</i>

¹⁷ On July 31, 2013, the Kapurs issued a subpoena to OTA's President and Chief Executive Officer, William Tolpegin, seeking the production of documents and Mr. Tolpegin's testimony in the California arbitration.

¹⁸ The Kapurs objected to this informational filing on the ground that the arbitrator's award had not been confirmed by a court. Meanwhile, in a contemporaneous newspaper column, Ravi Kapur alleged, among other things, that OTA's ultimate controlling owner, Michael S. Dell, was "aiding and abetting [KAXT LLC's] rogue shareholders, using [his] legal muscle to try and swipe away the station for half of what it's worth." R. Kapur, "The gutting of diversity in TV stations and media voices," *The Seattle Times*, Oct. 26, 2013.

¹⁹ The Kapurs objected to this informational filing on the ground that they "disagree[d]" with the court's decision and intended to appeal it.

Date Filed	Proceeding	Filing	Claim
September 8, 2014	BALDTA-20130211ACT	Reply to Opposition to Petition for Reconsideration	Sale of KAXT-CD to OTA was invalid and unenforceable; Seller lacked authority to sign assignor's portion of KAXT-CD assignment application; OTA's demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend applications to disclose the Kapurs' pending character allegations was unlawful.
November 3, 2014	BRDTA-20140731ANH ²⁰	Petition To Hold Renewal Application In Abeyance	OTA's demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend applications to disclose the Kapurs' pending character allegations was unlawful.
December 23, 2014	BRDTA-20140731ANH	Reply to Opposition to Petition to Hold Renewal Application in Abeyance	OTA's demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend applications to disclose the Kapurs' pending character allegations was unlawful.

²⁰ Application on FCC Form 303-S for Commission consent to the renewal of license of KAXT-CD, San Francisco-San Jose, California.

Date Filed	Proceeding	Filing	Claim
April 27, 2015	BALDTA-20130211ACT	Petition for Further Reconsideration	OTA's demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend applications to disclose the Kapurs' pending character allegations was unlawful; <i>OTA's insulation of former principal Todd Lawyer was inadequate.</i>
April 27, 2015	BRDTA-20140731ANH	Petition for Reconsideration	OTA's demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend applications to disclose the Kapurs' pending character allegations was unlawful; OTA's insulation of former principal Todd Lawyer was inadequate; <i>OTA's consultation with Seller in California state court litigation between Sellers and Kapurs implicated OTA's character qualifications.</i>
May 22 2015	BALDTA-20130211ACT, BRDTA-20140731ANH	Consolidated Reply To Consolidated Opposition	<i>Expressly abandoning claims regarding validity of sale of KAXT-CD in order to pursue "bullying" allegations against OTA;</i> OTA's demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend applications to disclose the Kapurs' pending character allegations was unlawful; OTA's insulation of former principal Todd Lawyer was inadequate; OTA's consultation with Seller in California state court litigation between Seller and Kapurs implicated OTA's character qualifications.

Date Filed	Proceeding	Filing	Claim
January 11, 2016	BRDTA-20140731ANH	Application for Review	Demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend applications to disclose the Kapurs' pending character allegations was unlawful; OTA's insulation of former principal Todd Lawyer was inadequate; OTA's consultation with Seller in California state court litigation between Seller and Kapurs implicated OTA's character qualifications.
February 10, 2016	BALDTA-20130211ACT, BRDTA-20140731ANH	Consolidated Reply to Oppositions to Application for Review	Demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend applications to disclose the Kapurs' character allegations was unlawful; OTA's insulation of former principal Todd Lawyer was inadequate; OTA's consultation with Seller in California state court litigation between Seller and Kapurs implicated OTA's character qualifications; <i>FCC should place OTA's auction proceeds in escrow so long as the Kapurs' challenge is pending "in any forum at any time, including at the Commission or in the courts."</i>

Date Filed	Proceeding	Filing	Claim
June 9, 2017	BALDTA-20130211ACT, BRDTA-20140731ANH	Motion to Hold Incentive Auction Payment in Abeyance Pending Resolution of OTA Character Qualifications	OTA incentive auction proceeds should be withheld pending resolution Kapurs' challenge; demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend certain applications to disclose the Kapurs' character allegations was unlawful; OTA's insulation of former principal Todd Lawyer was inadequate; OTA's consultation with Seller in California state court litigation between Seller and Kapurs implicated OTA's character qualifications; <i>certain (unspecified) alleged political file rule violations implicated OTA's character qualifications</i>
July 12, 2017	Acct. No. MB-201741410002 File No 161107 ²¹	Submission of New Material Evidence Considering the Political File Practices of OTA Broadcasting (SFO) ²²	Alleged violations of political file rules implicate OTA's character qualifications.

²¹ Investigation into the Political File Practices of OTA Broadcasting (SFO) (Media Bureau, Policy Division).

²² OTA addressed the Kapurs' allegations in a Compliance Report submitted on October 26, 2017, pursuant to Paragraph 16 of the Consent Decree entered in *Investigation into the Political File Practices of OTA Broadcasting (SFO), LLC*, Order, DA 17-89, 32 FCC Rcd 795 (2017). The matter has been taken under advisement by the Policy Division and is pending.

Date Filed	Proceeding	Filing	Claim
July 21, 2017	BALDTA-20130211ACT BRDTA-20140731ANH	Statement For the Record Concerning Public Notice Announcing Commission is Ready to Pay Reverse Auction Winning Bids	The Commission should immediately rescind its authorization of payment of any auction proceeds to OTA.
November 30, 2017	BAL-20171026ABS ²³	Petition to Deny	Demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend certain application to disclose the Kapurs' pending character allegations was unlawful; OTA's insulation of former principal Todd Lawyer was inadequate; OTA's consultation with Seller in California state court litigation between Seller and Kapurs implicated OTA's character qualifications; alleged political file rule violations implicate OTA's character qualifications
December 4, 2017	BALDTA-20130211ACT, BRDTA-20140731ANH	Petition for Reconsideration	Demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend certain application to disclose the Kapurs' pending character allegations was unlawful; OTA's insulation of former principal Todd Lawyer was inadequate; OTA's consultation with Seller in California state court litigation between Seller and Kapurs implicated OTA's character qualifications; alleged political file rule violations implicate OTA's character qualifications

²³ Application on FCC Form 314 for Commission consent to the voluntary assignment of license of KAXT-CD, San Francisco-San Jose, California, from OTA Broadcasting (SFO), LLC, to TV-49, Inc.

Date Filed	Proceeding	Filing	Claim
December 6, 2017	BALCDT-20171101ACJ ²⁴	Informal Objection	Demand letter following entry of arbitrator's award implicated OTA's character qualifications; the parties' contractual undertaking to place majority of purchase price in escrow pending final order was unlawful; OTA's failure to amend certain application to disclose the Kapurs' pending character allegations was unlawful; OTA's insulation of former principal Todd Lawyer was inadequate; OTA's consultation with Seller in California state court litigation between Seller and Kapurs implicated OTA's character qualifications; alleged political file rule violations implicate OTA's character qualifications.

Indeed, the Kapurs are blundering down a trail blazed by such notorious serial FCC filers as Anthony Martin-Trigona²⁵ and Warren Havens,²⁶ both of whose abusive practices are well known to the Commission and highly evocative of the Kapurs' conduct in this case.

The *Havens* matter is instructive. There, the Commission sanctioned an applicant — essentially enjoining him from further filings without the prior authorization of the Commission — whose relentless, repetitive filings were found to be "frivolous . . . because they [we]re 'based on arguments that have been specifically rejected by the Commission' or otherwise ha[d] 'no plausible basis for relief.'"²⁷ The Commission's conclusion reflected its frustration that, in the face of multiple decisions affirming the dismissal of his applications,

²⁴ Application on FCC Form 314 for Commission consent to the voluntary assignment of license of KTLN-TV, Palo Alto, California, from OTA Broadcasting (SFO), LLC, to TV-49, Inc.

²⁵ *In re Martin-Trigona*, 592 F. Supp. 1566, 1568 (D. Conn. 1984) (issuing injunction requiring prior approval for filings in federal courts, agencies, and other fora).

²⁶ The FCC staff and the Commission issued many decisions in multiple proceedings involving Mr. Havens. OTA will not list them all here. For present illustrative purposes the two most relevant decisions are *Warren C. Havens*, Third Order on Reconsideration (July 22, 2011) (the "*Third Havens Reconsideration Order*"), and *Warren C. Havens*, Memorandum Opinion and Order (Mar. 12, 2012) (the "*Havens MO&O*").

²⁷ *Third Havens Reconsideration Order*, ¶ 11.

Havens continued to re-litigate the underlying merits. In addition, the Commission noted that “Havens’ allegations about other [] licensees — even if true — provide no basis for reconsidering the decisions to dismiss Havens’ own [] applications in this proceeding.”²⁸

The Commission explained that it has legal authority to impose and enforce sanctions to prohibit repetitive pleadings pursuant to its inherent power to manage its proceedings and protect the integrity of its processes.²⁹ Also informing the Commission’s determination was its observation that Havens elected not to seek review of the Commission’s decisions at the D.C. Circuit Court of Appeals but, instead, continued to burden the Commission’s scarce resources by filing repetitive petitions for reconsideration at the agency.³⁰

Here, as with *Havens*, the Kapurs repeatedly have sought (and been denied) reconsideration or review — at the Division level and now at the Commission — of the staff’s decision denying their 2013 petition to deny the KAXT-CD assignment application. Like *Havens*, the Kapurs could have sought Commission review and then appealed to the D.C. Circuit — and presumably would have done so had they been confident in the merits of their case. Instead, like *Havens*, the Kapurs have chosen to continue filing repetitive pleadings at the Commission that merely restate arguments related to the underlying merits that have been rejected multiple times by the staff and the Commission. And, like *Havens*, the Kapurs have asserted allegations that are irrelevant to the specific matter before the Commission.

²⁸ *Id.* Havens had been warned previously not to continue to make frivolous filings and the Commission had directed staff summarily to dismiss any subsequent filings.

²⁹ *Havens MO&O*, ¶ 9 (collecting cases discussing an agency’s inherent authority). The Commission also rejected Haven’s First Amendment challenge to the sanction, noting that “[t]he First Amendment does not entitle a party to file frivolous and repetitive administrative pleadings in agency proceedings, any more than it allows a party to file such pleadings in a judicial forum.” *Id.* ¶ 12 (collecting cases in which courts have imposed pre-filing injunctions).

³⁰ *Id.* ¶ 12.

The Kapurs' conduct in this case — two trips back to the Video Division for reconsideration before seeking Commission review, followed by the instant Petition (not to mention their filings in other proceedings) — at a minimum creates the implication that they are seeking to delay final orders in these matters in order to obtain leverage in their ongoing dispute with their former business partners. This is a textbook example of abuse of process.³¹ It should not be tolerated.

³¹ See *Application of Nationwide Commc'ns, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 5654 ¶ 5 (1998) (“[The] use of our license renewal proceeding as a means to cause delay and economic injury to a principal of a former employer is an abuse of process. [The Commission] agree[s] with the staff that it should dismiss pleadings that appear to be primarily designed to cause harm or delay . . . rather than to air legitimate, substantive objections relevant to the application proceeding in which they are filed.”).

CONCLUSION

The Kapurs' allegations have been found — four times — to be without merit. Nothing in the Petition provides any basis or justification for the Commission to disturb its conclusions in the *MO&O* and the Petition therefore should be dismissed or denied forthwith. Further, OTA respectfully requests that the Commission address — and put an end to — the Kapurs' abuse of the Commission's processes in order to affect the outcome of a private contractual dispute.

Respectfully submitted,

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By: _____/s/_____

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Dated: December 18, 2017

ATTACHMENT

**OTA BROADCASTING (SFO), LLC'S
OPPOSITION TO APPLICATION FOR REVIEW**

**Before the
FEDERAL COMMUNICATIONS COMMISSION
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In re Application of)
)
OTA BROADCASTING (SFO), LLC,) File No. BRDTA-20140731ANH
) Facility ID No. 37689
)
For Renewal of the License of)
Television Broadcast Station KAXT-CD,)
San Francisco-San Jose, California)

TO: Marlene H. Dortch, Secretary

OPPOSITION TO APPLICATION FOR REVIEW

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Dated: January 28, 2016

SUMMARY

The Petitioners here, Nalini Kapur, Rishi Kapur and Ravi Kapur, are non-controlling investors in KAXT, LLC, the former licensee of KAXT-CD. Since 2013, the Kapurs have sought to use Commission processes first to block, and then to unwind, the sale of KAXT-CD by KAXT, LLC, to OTA pursuant to an Asset Purchase Agreement that an arbitrator and the California state courts repeatedly and decisively have concluded, in response to legal challenges by the Kapurs, was valid and enforceable.

The Video Division has rejected the Kapurs' factual allegations and legal theories three separate times. In the *Second Reconsideration Order*, which is the subject of the instant appeal, the staff denied the Kapurs' "Petition for Further Reconsideration," filed on April 27, 2015, and affirmed its two previous orders collectively denying the Kapurs' many interrelated objections and granting (or affirming the grant of) applications for Commission consent both to the assignment of the license of the Station from KAXT, LLC to OTA and the renewal of the Station's license, which also was challenged by the Kapurs.

In affirming—and reaffirming—the grant of these applications, the Video Division staff thoroughly and fairly evaluated each of the allegations and arguments embodied in the Kapurs' many petitions and supplemental filings. It carefully considered the underlying facts and circumstances. It deferred appropriately to the jurisdiction of the California courts. It relied on well-established and binding Commission authority. The Kapurs object to the outcome of this painstaking, iterative process but fail to demonstrate that it was wrong.

As with its previous multiple petitions for reconsideration, the Kapurs' appeal has not identified any errors of fact or law in any of the staff's well-reasoned decisions in this matter. Accordingly, the Application for Review should be dismissed or denied forthwith.

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

In re 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)

In re Application of)
)
OTA BROADCASTING (SFO), LLC,) File No. BRDTA-20140731ANH
) Facility ID No. 37689
)
For Renewal of the License of)
Television Broadcast Station KAXT-CD,)
San Francisco-San Jose, California)

TO: Marlene H. Dortch, Secretary

OPPOSITION TO APPLICATION FOR REVIEW

OTA Broadcasting (SFO), LLC (“OTA”), by its attorneys and pursuant to Section 1.115(d) of the Commission’s Rules, 47 C.F.R. § 1.115(d), hereby opposes the Application for Review filed in the captioned matters on January 11, 2016 (the “Application for Review”), by Nalini Kapur, Rishi Kapur, and Ravi Kapur (collectively, the “Kapurs”).¹ The

¹ This Opposition is timely filed pursuant to *Public Notice*, “Waiver of Filing Deadlines Due to Adverse Weather Conditions,” DA 16-92 (rel. Jan. 27, 2016) (directing that “all paper and electronic filings that were due on January 22 through January 27, 2016, will now be due on Thursday, January 28, 2016.”).

Kapurs seek Commission review of the *Memorandum Opinion and Order*, DA 15-1414, issued on December 11, 2015, by the Chief, Video Division, Media Bureau (the “*Second Reconsideration Order*”).²

I. BACKGROUND

A. The Kapurs’ Initial Opposition To The KAXT Assignment Application.

On January 28, 2013, OTA in good faith entered into the APA with KAXT, LLC, to acquire the Station.³ On February 11, 2013, OTA, in good faith and jointly with KAXT, LLC, filed an application on FCC Form 314 for Commission consent to the proposed transaction.⁴

On March 18, 2013, the Kapurs, who are non-controlling investors in KAXT, LLC, filed a “Petition to Dismiss, Deny, or in the Alternative, Hold Application in Abeyance” (the “First Petition”), asking the Commission to deny or withhold its consent to the proposed transaction until “final resolution” of a private contractual dispute between the Kapurs and the controlling members of KAXT, LLC. As the Kapurs acknowledge,⁵ the only argument they

² The *Second Reconsideration Order* denied the Kapurs’ “Petition for Further Reconsideration” filed on April 27, 2015, and affirmed the Video Division’s previous orders collectively denying the Petitioners’ many interrelated objections to (1) the assignment of the license of KAXT from KAXT, LLC to OTA (the “KAXT Assignment Application”) and (2) the renewal of license of KAXT (the “KAXT Renewal Application”). See *KAXT, LLC (Assignor) 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, 29 FCC Rcd 8266 (Vid. Div. 2014) (the “*MO&O*”) (disposing of the Kapurs’ “Petition to Dismiss, Deny, or, in the Alternative, Hold Application in Abeyance” and granting the assignment application in File No. BALDTA-20130211ACT); *KAXT, LLC (Assignor) 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, 30 FCC Rcd 2691 (Vid. Div. 2015) (the “*First Reconsideration Order*”) (disposing of Petitioners’ petition for reconsideration of the *MO&O* and granting the license renewal application in File No. BRDTA-20140731ANH).

³ See File No. BALDTA-20130211ACT, FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, Attachment 5.

⁴ See *id.* The KAXT Assignment Application was accepted for filing on February 12, 2013.

⁵ See Application for Review at 3 (acknowledging that the proceedings culminating in the Application for Review “arose from a dispute between Petitioners and [the controlling members of KAXT, LLC] over

raised in the First Petition was that the controlling members of KAXT, LLC, lacked authority to enter into the APA and to execute and file the KAXT Assignment Application while the Kapurs and the controlling members were engaged in arbitration on that issue (which, as described below, was resolved adversely to the Kapurs).

OTA was caught in the crossfire between the warring KAXT, LLC, ownership factions for nearly a year as they pursued arbitration of their contract dispute and the KAXT Assignment Application remained pending. Then, on January 22, 2014, the arbitrator hearing the dispute “declared and confirmed that the Asset Purchase Agreement between OTA, LLC and KAXT, LLC was duly authorized and validly executed by KAXT, LLC, and may be consummated in accordance with its terms.”⁶ The Final Arbitration Award obviated the only claim raised in the Petition to Deny.

Three months later, the Final Arbitration Award was confirmed by the Superior Court of California for the County of Sacramento. In an order issued on April 24, 2014, the court found that the arbitrator “gave well-reasoned explanations for his construction of provisions in the contracts at issue” and that the Kapurs had not provided any reason to disturb the award.⁷ The arbitrator’s decision had “the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action . . . and it may be enforced like any other judgment of the court.”⁸ The Superior Court’s ruling was subsequently upheld by the

control of KAXT, LLC, the prior licensee of the Station”), 5 (“Petitioners’ original pleading in this case focused on the issue of whether the assignor possessed the legal authority to sell the Station.”).

⁶ See *Trumbly v. Kapur*, Final Award, Ex. 1, at 15-16, No. 74-140-00012-13 SM, American Arbitration Association (Jan. 22, 2014) (“Final Arbitration Award”).

⁷ *Kapur v. Trumbly*, No. 34-2013-00148233, Minute Order at 4 (Cal. Sup. Ct. Apr. 24, 2014).

⁸ Cal. Code Civ. P. § 1287.4

Court Of Appeal of the State Of California, Third Appellate District.⁹ The Court of Appeal's ruling is final and no longer subject to review.

The issuance of the Final Arbitration Award confirmed that the sole reason the Kapurs offered in the First Petition for rejecting the Assignment Application—that the APA was not validly executed by KAXT, LLC—lacked merit. However, almost a month after the arbitrator's decision was issued, the Kapurs had taken no action to notify the Commission of this important development or seek to withdraw their now-baseless First Petition. During this time, the KAXT Assignment Application continued to languish at the Commission.

Accordingly, on February 17, 2014, OTA's counsel wrote to the Kapurs' counsel (the "February 17 Letter") to demand that the Kapurs abandon all of their continuing efforts to disrupt the transaction. The February 17 Letter also demanded that the Kapurs withdraw the First Petition, which was based solely on their contentions, now determined by the arbitrator to have been without merit, regarding the validity of the APA. In the February 17 Letter, OTA stated its intention to pursue all its available legal remedies against *both* KAXT, LLC, *and* the Kapurs in order to secure performance of KAXT, LLC's obligations under the APA.¹⁰

B. Changing Tactics, The Kapurs Begin To Attack OTA.

The Kapurs did not respond to the February 17 Letter. Instead, having been rebuffed decisively by an arbitrator, the California Superior Court, and eventually the California

⁹ See *Kapur v. Trumbly*, No. C076804, 2015 WL 2329294 (Cal. App. Ct. May 14, 2015).

¹⁰ The February 17 Letter identified several activities by the Kapurs, in addition to their FCC opposition, that appeared to be intended to disrupt the proposed transaction with the ultimate goal of causing the termination of the APA. These included pursuing additional litigation against KAXT, LLC, in the California courts and soliciting competing offers to acquire the Station after the APA had been executed and become effective. OTA demanded that the Kapurs cease "any and all conduct that could cause the termination of the [APA] or further delay OTA's contractual right to acquire KAXT-CD." February 17 Letter at 3.

State Court of Appeal in their attempt to invalidate the APA—the only basis for their contention in the First Petition that the Commission should deny or defer action on the KAXT Assignment Application—the Kapurs pivoted from their contract claim against KAXT, LLC, to train their sights on OTA. In a “Supplement” to the First Petition filed on February 24, 2014, the Kapurs invoked OTA’s good-faith attempt to enforce its contractual rights as the basis for raising character allegations against OTA.¹¹

C. The Video Division Rejects The Kapurs’ First Challenge To The KAXT Assignment Application.

In the *MO&O*, the Video Division staff denied the First Petition, as supplemented, and granted the KAXT Assignment Application. The staff observed that, as determined by the arbitrator and affirmed by the California Superior Court—and therefore contrary to the Kapurs’ allegations before the Commission—the APA was validly signed and capable of being effectuated.¹² Noting that “the Commission does not adjudicate private contractual matters,” the staff rejected the Kapurs’ demand that the Commission deny or defer action on the KAXT Assignment Application pending a “final resolution” of their dispute with the controlling members of KAXT, LLC.¹³

¹¹ See “Supplement to Petition to Dismiss, Deny, or, in the Alternative, Hold Application in Abeyance” (Feb. 24, 2014) (the “February 24 Supplement”), at 2-3. Ultimately, the February 24 Supplement devolved into a strident *ad hominem* attack on one of OTA’s owners. See *id.* at 3 (among other things, implying that OTA’s publicly stated intention to participate in the broadcast incentive auction disqualified it as a proposed assignee under the public interest standard).

¹² *MO&O* at par. 9 (observing that the Final Arbitration Award, which . . . has been confirmed by a state court, moots the Petitioners’ primary allegation.”).

¹³ *Id.*

The *MO&O* also denied the Kapurs' untimely allegation that OTA lacked the necessary character qualifications to be the licensee of the Station.¹⁴ The staff held, consistent with well-established Commission precedent, that "all applicants" may enforce their contractual rights "by pursuing all available legal relief without impermissibly infringing upon petitioners' rights."¹⁵ The staff rejected the Kapurs' contention that the February 17 Letter discouraged access to the Commission or participation by the public.¹⁶ OTA and KAXT, LLC consummated the purchase and sale of the Station immediately following issuance of the *MO&O* on July 11, 2014.

D. The Kapurs Continue To Use The Commission's Processes To Advance Their Private Contractual Dispute While Expanding Their Attacks On OTA.

In a Petition for Reconsideration filed on August 11, 2014 (the "First Reconsideration Petition"), the Kapurs restated arguments that the staff had considered carefully, and at great length, in the *MO&O*. The Kapurs—after noting that their dispute with the controlling members of KAXT, LLC, had delayed consideration of the KAXT Assignment Application "for nearly a year and a half"—nonetheless chided the staff for acting "abruptly" in issuing the *MO&O*.¹⁷

In a continuing effort to appropriate the Commission's processes in order to gain an advantage in their private contractual dispute, the Kapurs contended, without citation to Commission precedent or policy, that the Commission had acted "prematurely" by granting the KAXT Assignment Application prior to "final resolution" of their contractual arguments by an

¹⁴ *Id.* at par. 11.

¹⁵ *Id.* at par. 12 (citing *Fort Collins Broadcasting Co., Inc.*, 38 F.C.C.2d 707 (1972)).

¹⁶ *Id.*

¹⁷ First Reconsideration Petition at 3.

appellate court.¹⁸ Similarly, the Kapurs repeated their contention that OTA's assertion of its contractual rights under the APA following an arbitrator's favorable ruling implicated its character qualifications.¹⁹

The Kapurs also used their reconsideration petition to expand their attack on OTA's qualifications. Among other arguments, the Kapurs contended that OTA demonstrated a lack of candor by failing to disclose the Kapurs' allegations regarding the February 17 Letter in the KAXT Renewal Application, which had been filed on July 31, 2014.²⁰

E. The Video Division Rejects The Kapurs' Second Challenge To The KAXT Assignment Application.

In the *First Reconsideration Order*, issued on March 25, 2015, the Video Division staff denied the Kapurs' First Reconsideration Petition. The staff concluded that the petition merely reiterated arguments that previously had been considered and denied, and that it otherwise was unpersuasive.²¹ For example, the staff noted that the Kapurs had not cited any authority for their repeated contention that the Commission was obligated to wait for all judicial

¹⁸ *Id.* at 2-3 (contending that the staff was obliged to wait "for the appellate process to play out completely before taking any action," notwithstanding that, by then, the Final Arbitration Award had been affirmed by the California Superior Court).

¹⁹ *Id.* at 3-5.

²⁰ *Id.* at 7-8. On November 3, 2014, the Kapurs filed a "Petition to Hold Renewal Application in Abeyance" in File No. BRDTA-20140731ANH (the "Renewal Petition"), asking the Commission to defer action on the KAXT Renewal Application pending resolution of its objections to the KAXT Assignment Application. The Video Division denied the Renewal Petition in the *First Reconsideration Order*. On April 27, 2015, the Kapurs sought reconsideration of the *First Reconsideration Order* to the extent it denied the Renewal Petition and granted the KAXT Renewal Application (the "Renewal Reconsideration Petition"). The Video Division disposed of the Renewal Reconsideration Petition in the *Second Reconsideration Order*. Because the Kapurs' arguments in the Renewal Petition and the Renewal Reconsideration Petition are substantively identical to the arguments in its pleadings relating to the KAXT Assignment Application they are not addressed separately here.

²¹ *First Reconsideration Order* at par. 9.

processes to be exhausted before acting on the KAXT Assignment Application.²² To the contrary, the staff observed, its grant of the KAXT Assignment Application was fully consistent with the Supreme Court's opinion in *Radio Station WOW v. Johnson*,²³ which, as the staff explained, held that the Commission has ultimate authority over licensing matters subject to proper deference to state interests. Accordingly the staff concluded that it was appropriate to proceed with review of the KAXT Assignment Application as a discretionary matter of comity with the California arbitrator; indeed, the staff emphasized that in moving forward to process and grant the KAXT Assignment Application it had been comfortable to rely "solely" on the Final Arbitration Award, and that it "only cited to the court affirmance as further support for this conclusion."²⁴ The staff observed, again, that the dispute over the validity of the APA "is an issue of private contract law," the continuing controversy over which "is not affected by our decision here."²⁵

The Video Division staff similarly concluded that the Petition merely reiterated facts or arguments that it previously had considered, and rejected, in reaching its conclusion that the February 17 Letter did not constitute intimidation or discourage access to the Commission or participation by the public.²⁶ Therefore—even, the staff emphasized, assuming all the facts as

²² *Id.* at par. 10.

²³ 326 U.S. 120, 131-32 (1945) (noting that the Commission's independent exercise of its licensing authority does not operate to "nullify" state interests and directing that "the principle of fair accommodation between State and federal authority, where the powers of the two intersect, should be observed.").

²⁴ *First Reconsideration Order* at par. 10.

²⁵ *Id.* (noting, in addition, that "[o]ur grant of the [KAXT Assignment Application] is permissive only, and the Applicants consummated with the risk that an appellate court may overturn the initial court decision.").

²⁶ *Id.* at pars. 11-12.

alleged—the renewed allegations did not raise an issue regarding OTA’s qualifications to become the licensee of the Station.²⁷

The staff did accept the Kapurs’ contention that OTA should have updated the KAXT Renewal Application to disclose the character issues the Kapurs had raised in the pending proceeding regarding the KAXT Assignment Application, even though those allegations had been dismissed in the *MO&O*.²⁸ However, the staff concluded that, based on a review of the record as a whole, this failure did not raise a substantial and material question of fact concerning OTA’s character qualifications. The staff reasonably concluded that where OTA was publicly defending the allegations in another proceeding involving the same station, it was inappropriate to infer an intent to deceive from OTA’s failure to disclose them in the KAXT Renewal Application.²⁹

F. The Kapurs Seek “Further Reconsideration” Of The *MO&O* In Order To Expand Their Attacks On OTA Yet Again.

Not to be deterred, on April 27, 2015, the Kapurs filed a “Petition for Further Reconsideration” (the “Further Reconsideration Petition”) asking the staff to reconsider and reverse its two prior decisions and restore the Station’s license to KAXT, LLC.

The Kapurs now abandoned altogether the original stated basis for their opposition to the grant of the KAXT Assignment Application, *i.e.*, that the APA was invalid and

²⁷ *Id.*

²⁸ *Id.* at par 16.

²⁹ *Id.* at par. 17. At the end of the *First Reconsideration Order* the staff admonished OTA for failing to update the KAXT Renewal Application but concluded that the failure did not constitute a “serious” violation or otherwise indicate a “pattern of abuse,” or a “flouting” of the Commission’s rules, as the Kapurs had alleged. “Rather,” the staff observed, “OTA appears to be legitimately confused as to whether it needed to disclose the [KAXT] Assignment Application under its reading of staff precedent.” *Id.* at par. 18.

unenforceable. Instead, they pursued an entirely new theory, contending that an order issued on April 1, 2015, by the Superior Court of California for the County of Santa Clara in a separate dispute between the controlling members of KAXT, LLC, and Diya TV, another business apparently owned by the Kapurs, called into further question *OTA's* character with regard to its truthfulness and reliability before the Commission.³⁰ In addition, the Kapurs alleged, also for the first time, that OTA had improperly failed to disclose the 2013 felony conviction of Todd Lawyer, the former President and Chief Executive Officer of OTA's corporate parent, even though Mr. Lawyer had ceased to have an attributable interest in OTA.³¹

G. The Video Division Rejects The Kapurs' Third Challenge To The KAXT Assignment Application.

As it had done in disposing of the First Reconsideration Petition, the Video Division staff found the Kapurs' arguments for further reconsideration to be reiterations of arguments that previously had been considered and rejected, or not based on changed circumstances, or otherwise unpersuasive. Noting that the Further Reconsideration Petition constituted only "the latest of multiple challenges to the assignment and renewal of the Station's license," the *Second Reconsideration Order* admonished the Kapurs that "staff may dismiss or deny petitions for reconsideration that plainly do not warrant consideration by the Commission, including petitions that rely on arguments that have been fully considered and rejected by the Commission within the same proceeding."³²

³⁰ See Further Reconsideration Petition at 6-7.

³¹ *Id.* at 8-10.

³² *Second Reconsideration Order* at par. 15.

The staff rejected the Kapurs' contention that changed circumstances or newly disclosed facts relating to the Kapurs' California lawsuits warranted reconsideration. The staff explained that the Kapurs' attempt to conflate their earlier unfounded contentions regarding the February 17 Letter with new allegations that OTA had "acted as a bully" in other California litigation were "misguided and irrelevant."³³ The Commission's role in evaluating litigation threats, the staff explained, "is limited to preserving access to the Commission's processes," which it had concluded previously had not been compromised in this case; indeed, the staff observed, even if the Kapurs' allegations were taken as true—which they were not— "OTA's apparent involvement" in the California litigation "constitute exactly the full pursuit of legal remedies expressly approved by the *MO&O* and Commission precedent."³⁴

Finally, the staff concluded, correctly, that information regarding Mr. Lawyer's circumstances had been publicly available for years before the Kapurs raised it in their Further Reconsideration Petition. Moreover, and in any case, the staff noted that the Kapurs had acknowledged that OTA had disclosed in multiple FCC filings that Mr. Lawyer had ceased to have an attributable interest in OTA, thereby obviating the need for disclosure of the conviction, which, as the Kapurs acknowledge, was a matter of public record.³⁵

II. ARGUMENT

The Application for Review, like the First Reconsideration Petition and the Further Reconsideration Petition, offers up a rehash of factual allegations and legal arguments that repeatedly have been evaluated and rejected by the Video Division staff. Once again, the

³³ *Id.* at par. 18.

³⁴ *Id.*

³⁵ *Id.* at par. 19.

Kapurs would have the Commission reject its own precedent and disregard the facts of record in order to advantage it in its ongoing private business dispute with the controlling members of KAXT, LLC. The staff's disposition of the Kapurs' allegations was thorough, thoughtful and correct, and should be sustained.

A. In The Face Of Multiple Unfavorable Judicial And FCC Decisions, The Kapurs Have Abandoned The Sole Basis For Their Underlying Opposition To The Grant Of The KAXT Assignment Application.

The underlying basis of the Kapurs' opposition to the KAXT Assignment Application was their belief that the sale of the Station to OTA was invalid and unenforceable.³⁶ Even after the sale had been approved by an arbitrator and affirmed by the California courts, the Kapurs kept trying to enlist the Commission in their efforts to prevent KAXT, LLC from selling the Station.

Not surprisingly, the Application for Review is silent on this key issue. First, as described above, the Kapurs' allegations regarding the supposed invalidity of the APA have been soundly and repeatedly rejected by an arbitrator and the California trial and appellate courts and is no longer subject to judicial review. Second, as is manifest in the record below, the Video Division staff has appropriately refused to allow the Commission's processes to be implicated in a private contractual dispute.

B. The Kapurs' Challenges To OTA's Character Qualifications Lack Merit.

Unable to prevent KAXT, LLC, from *selling* the Station, the Kapurs shifted tactics in an effort to prevent OTA from *buying* it. According to the Kapurs, the February 17 Letter, OTA's failure to update the KAXT Renewal Application to reflect the Kapurs' challenge to its character, the purported findings of a California court, and a felony conviction of a former

³⁶ See Application for Review at 3, 5. This also was the basis for the Kapurs' Renewal Petition.

executive at OTA's parent (Todd Lawyer) are evidence that OTA is not qualified to own the Station. The Video Division staff correctly rejected each of these arguments, and the Commission should do the same.

1. The February 17 Letter Was An Appropriate Effort By OTA To Enforce Its Contractual Rights.

The Commission as a matter of policy does not involve itself in private contractual disputes that are appropriately left to the courts for resolution.³⁷ Just as clearly, Commission precedent establishes that broadcast applicants and licensees may seek to enforce their contractual rights by pursuing any legal remedies at their disposal.³⁸ It follows that an applicant's or licensee's good faith statements regarding the possibility of litigation to enforce those rights also do not implicate the Commission's character policy.³⁹

The Commission repeatedly has affirmed both the right of applicants and licensees to pursue their available legal remedies, and that the good-faith pursuit of such remedies does not implicate its character policy. In *Fort Collins Broadcasting Co., Inc.*, where a licensee threatened to file a defamation suit against an FCC petitioner if the petitioner did not withdraw its petition, the Commission declined to initiate a character inquiry because the licensee, "acting like any other potential litigant, believed in good faith that it could advise [the

³⁷ See *Patrick Henry*, 69 F.C.C.2d 1305, 1312 (1978) ("The Commission traditionally has declined to intervene in matters of local law which best are settled by local forums having jurisdiction over such proceedings."). As the Video Division stated in the *MO&O* (at par. 9), simply, "the Commission does not adjudicate private contractual matters." See also *Arecibo Radio Corp.*, 101 F.C.C.2d 545, 548 (1985), and *John F. Runner, Receiver*, 36 R.R.2d 773, 778 (1976).

³⁸ See *Patrick Henry*, 69 F.C.C.2d at 1311 ("[W]e manifestly lack any authority to issue an order purporting to restrain any individual or entity from the exercise of its legal rights concerning matter over which we have no jurisdiction."). See also *Radio Station WOW v. Johnson*, discussed above at footnote 23.

³⁹ See *David D. Oxenford, Esq.*, 26 FCC Rcd 392, 395-96 (Aud. Div. 2011) (no character issue where licensee reasonably believed he had a cause of action under state law). See also *MO&O* at par. 12.

petitioner] that it might file suit.”⁴⁰ Further, the Commission concluded that in providing notice of its intent to sue, including its demand that a pending FCC petition be dismissed, the licensee had not impermissibly discouraged the petitioner from expressing its grievances to the Commission.⁴¹

Here, the February 17 Letter was an appropriate measure by OTA, undertaken in good faith, to defend its legal rights under the APA. It came only after an arbitrator had found that the APA was “duly authorized and validly executed” and only several weeks after the Kapurs had failed to notify the Commission that their only basis for opposing the KAXT Assignment Application had been found to lack merit. In other words, this is not a case “where an applicant takes action which is reasonably and seriously calculated to harass or intimidate a petitioner to deny or other party with the aim of discouraging its rightful participation in Commission proceedings,” which the Commission has observed is the only circumstance where “[c]haracter or abuse of process issues are warranted.”⁴²

OTA sought in good faith to perfect its legal rights under the APA in the face of conduct that the detailed findings of an arbitrator suggested would give rise to a valid cause of action in state court. Nothing in the Commission’s rules or precedent prohibits from doing so.

⁴⁰ *Fort Collins Broadcasting Co., Inc.*, 38 F.C.C.2d 707, 711-712 (1972). *See also* MO&O at par. 12 (observing that in *Fort Collins* the Commission affirmed, among other things, that “an applicant’s advising a petitioner that it might file suite does not reflect adversely on the licensee’s character qualifications.”).

⁴¹ *Fort Collins*, 38 F.C.C.2d at 711.

⁴² *Federal Broadcasting System, Inc.*, 62 F.C.C.2d 861, 869 (Rev. Bd. 1977).

2. OTA's Failure To Update The KAXT Renewal Application Did Not Evince An Intent To Deceive The Commission.

Next, the Kapurs repeat their contention that OTA's failure to disclose their pending character allegations in the KAXT Renewal Application raises a character issue.⁴³ As of July 31, 2014, when the KAXT Renewal Application was filed, the Kapurs' character allegations had been rejected as without merit, the KAXT Assignment Application had been granted, the transactions authorized under the APA had been consummated, and the Kapurs had not yet sought "reconsideration" or "further reconsideration" of the *MO&O*. The Commission has stated that until character allegations "are determined to have merit and are designated for hearing," they are not required to be disclosed as pending against the applicant.⁴⁴ Furthermore, where the information at issue is on file in another Commission proceeding, the Commission will not infer either an intent or a motive to deceive.⁴⁵

Here, far from being determined to have merit, the Kapurs' character allegations were in fact denied. At most, as the staff observed, OTA was "legitimately confused" to whether disclosure was required under the circumstances.⁴⁶ The Video Division staff therefore properly concluded that OTA's answer to the question in the KAXT Renewal Application does not implicate the Commission's character policy.

⁴³ Application for Review at 11-12.

⁴⁴ *Greater Muskegon Broadcasters, Inc.*, 11 FCC Rcd 15464, 15472 (1996); *see also Coosa Valley News, Inc.*, 23 FCC Rcd 9146, 9149 (2008).

⁴⁵ *Greater Muskegon Broadcasters, Inc.*, 11 FCC Rcd at 15472-73.

⁴⁶ *First Reconsideration Order* at par. 18.

3. OTA Did Not Mislead The Video Division About Its Involvement In The Kapurs' Disputes With The Controlling Members Of KAXT, LLC.

The Kapurs also take issue with OTA's assertion in a March 17, 2014 filing⁴⁷—a filing responding to the Kapurs' character attack on OTA based on the February 17 Letter—that OTA was a bystander in an “intramural squabble” during the KAXT, LLC, arbitration.⁴⁸ According to the Kapurs, an April 2015 order by Judge Yew of the Superior Court of California for the County of Santa Clara—in a proceeding that did not concern the arbitration or the validity of the APA, and a proceeding to which OTA was not a party—undermines the veracity of the March 17 Comments, which in their view justifies reversing the grant of the KAXT Assignment Application.⁴⁹ Again, the Kapurs are mistaken.

As a threshold matter, while the Kapurs criticize the staff for supposedly *disregarding* OTA's alleged misrepresentations, they ignore the staff's finding that OTA *never made a misrepresentation in the first place*.⁵⁰ The Kapurs do not dispute the staff's finding that “OTA was not a party or intervenor in the arbitrated ownership dispute or its appeals.”⁵¹ Instead, they contend that Judge Yew made what they characterize as “findings” that “OTA was directly involved in the Arbitration, effectively in the room and at the table helping the Trumbly Group

⁴⁷ See OTA's “Comments on Supplement to Petition to Dismiss, Deny, or, in the Alternative, Hold Application in Abeyance” (March 17, 2014) (the “March 17 Comments”).

⁴⁸ Application for Review at 3-7.

⁴⁹ This ruling was issued in litigation between Diya TV, Inc. (“Diya TV”), a business the Kapurs apparently own, and KAXT, LLC. The litigation does not concern the authority of KAXT, LLC, to sell the Station to OTA or the validity of that sale, which has been affirmed by an arbitrator and the California courts. Instead, the litigation concerns other aspects of the ongoing, pervasive business dispute between the Kapurs and the controlling members of KAXT, LLC.

⁵⁰ *Second Reconsideration Order* at par. 17.

⁵¹ *Id.*

try to defeat Petitioners' claims."⁵² But the Kapurs cite nothing in Judge Yew's order to support this claim. Nor can they: Judge Yew never made such "findings." Ultimately, the Kapurs do not, and cannot, dispute that OTA did nothing more than engage in discussions with KAXT, LLC's controlling members about the arbitration and its effect on OTA's acquisition of the Station-as any rational business person would have sought to do when its bargained-for rights were effectively being held hostage by a business dispute among the owners of the seller.⁵³ As the staff concluded, "OTA's description of" its lack of involvement in the KAXT, LLC, dispute "was not inaccurate."⁵⁴

The staff's conclusion is especially significant considering the timing of the alleged misrepresentation. The majority of the conduct cited in Judge Yew's order took place *after* OTA's March 17 Comments were filed. The post-March 17, 2014 conduct mentioned in Judge Yew's order involved efforts to close the KAXT-CD purchase and sale transaction *after* the arbitrator had rejected the Kapurs' challenge to the APA and *after* the Commission had approved the KAXT Assignment Application. The only conduct Judge Yew could have found occurred *before* March 17, 2014 were the unremarkable facts that a buyer (OTA) "worked closely" with the controlling members of a seller (KAXT, LLC) and that they "discuss[ed]

⁵² Application for Review at 13.

⁵³ In this connection, OTA had been obligated to make an escrow deposit of more than \$500,000 shortly after the APA was executed. *See* APA at Section 1.4(b).

⁵⁴ *Second Reconsideration Order* at par. 17. In any case, as the staff noted, "our role is limited to preserving access to the Commission's processes, not adjudicating other allegedly coercive behavior." Indeed, the staff continued, "OTA's apparent involvement in a detainer action and other litigation activities also constitute exactly the full pursuit of legal remedies expressly approved by the *MO&O* and Commission precedent, and we affirm again OTA's rights to pursue all legal remedies at its disposal." *Id.* at par. 18.

strategy during the arbitration.”⁵⁵ None of these findings cast doubt on the veracity of OTA’s assertions in the March 17 Comments, particularly given the blizzard of litigation between the Kapurs and the controlling members of KAXT, LLC, and its effect on OTA’s ability to close the KAXT-CD transaction.⁵⁶

Even if a misrepresentation had occurred—and none did—the staff did not commit “reversible error,” as the Kapurs put it,⁵⁷ in failing to give any weight to a passing reference in an FCC filing about OTA’s lack of involvement in the KAXT, LLC, arbitration proceeding. As the staff observed, it never “relied on OTA’s representations about involvement in that arbitration proceeding” because those assertions are “irrelevant.”⁵⁸ The *Character Policy Statement* states that “Commission policy will ordinarily be to consider all the facts of a case in making decisions as to the disposition of matters involving misrepresentation or lack of candor.”⁵⁹ That is precisely what the staff did here. Faced with the Kapurs’ request to reconsider the *MO&O* based on the Kapurs’ characterization of a California court’s findings, the staff was entitled to respond by pointing out that since OTA’s involvement in the KAXT, LLC, arbitration—even if it had occurred as alleged—played no role in its grant of the KAXT Assignment Application, allegedly new facts about OTA’s involvement could not provide a basis to reconsider its prior decision.

⁵⁵ Further Reconsideration Petition, Attachment A at 9-10. Although Judge Yew does not mention it, OTA received a subpoena from the Kapurs to produce documents in connection with the separate arbitration proceeding—a subpoena OTA fully complied with.

⁵⁶ By OTA’s count, three separate lawsuits have been filed involving the Kapurs and KAXT, LLC’s controlling members: the arbitration seeking to resolve the question of who controlled KAXT, LLC, and the validity of the APA; a lawsuit seeking to give the Kapurs access to the Station; and a lawsuit seeking to enforce a contract giving Diya TV the right to broadcast on the Station.

⁵⁷ Application for Review at 12.

⁵⁸ *Second Reconsideration Order* at par. 17.

⁵⁹ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1211 (1986).

The fundamental flaw with the Kapurs' argument is that they rely on purported findings made in a litigation to which OTA was not a party and to which it therefore did not have an opportunity to respond—and which had nothing to do with the validity of KAXT LLC's sale of the Station to OTA. In fact, OTA was forced to appear in that proceeding when Judge Yew directed it to respond the Kapurs' claims that Diya TV was entitled to occupy the Station's facilities and to air programming over the Station even after the grant of the KAXT Assignment Application and consummation of the sale of the Station to OTA. Following OTA's appearance, the very same court whose "findings" are the subject of the Kapurs' Application for Review ordered Diya TV to promptly vacate the Station's premises.⁶⁰

4. OTA Took Timely And Appropriate Steps To Insulate Todd Lawyer Consistent With The Commission's Rules.

Finally, the Kapurs renew their contention that OTA failed to make disclosures regarding a felony conviction of Mr. Todd Lawyer, a non-party to the KAXT Assignment Application. Even leaving aside their erroneous legal theory, the Kapurs acknowledge that the purported basis of their allegations is a document filed with the Commission by OTA more than two years ago.⁶¹ This can hardly be said to constitute newly discovered, changed circumstances warranting reconsideration.

Further, the Kapurs erroneously contend that the staff has applied an incorrect legal standard. As the staff explained in the *Second Reconsideration Order*, the Kapurs—like any petitioner for reconsideration raising arguments for the first time—had the burden to demonstrate that facts regarding Mr. Lawyer were not known “and could not, through the

⁶⁰ See OTA's Opposition to Petition for Reconsideration, File No. BALDTA-20130211ACT (Aug. 26, 2014), Ex. C.

⁶¹ Application for Review at 9.

exercise of ordinary diligence,” have been raised earlier in the proceeding.⁶² Yet even now, the Kapurs fail to offer any testimony as to how they learned of Mr. Lawyer’s conviction or to support their contention that it could not have been discovered through the exercise of ordinary diligence. Nor could they, given that the very source of the information on which the Kapurs rely is a press release that has been (and continues to be) publicly available on the website of the U.S. District Court for the Eastern District of Virginia for nearly three years.⁶³

In any case, the facts surrounding Mr. Lawyer’s conviction do not implicate OTA’s qualifications. Pursuant to the letter agreement between OTA’s parent company, OTA Broadcasting, LLC (“OTA Broadcasting”), and Mr. Lawyer dated as of February 8, 2013 (the “February 8 Letter”), amending the OTA Broadcasting LLC Agreement, Mr. Lawyer does not have an attributable interest in OTA.⁶⁴

The Kapurs’ claim that OTA “concealed” Mr. Lawyer’s conviction rings especially hollow in light of their acknowledgment that the February 8 Letter was on file at the Commission (and the DOJ Press Release was issued) before the Kapurs’ various attacks on OTA’s character were made. The Commission has repeatedly held that “the *sine qua non* of misrepresentation or lack of candor is intent to deceive the Commission, and has declined to

⁶² *Second Reconsideration Order* at par. 14. See 47 C.F.R. § 1.106(c)(1) (reconsideration petition relying on new facts will be entertained only if, among other factors, the facts were “unknown to 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 . . . prior to such opportunity”).

⁶³ <http://www.justice.gov/usao-edva/pr/brokerage-executive-pleads-guilty-illegal-hotel-flipping-scheme> (last accessed January 26, 2016) (the “DOJ Press Release”). The Kapurs concede they had knowledge of the press release, but complain that it “did not highlight” Mr. Lawyer’s case. Application for Review at 9.

⁶⁴ See *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 58 R.R.2d 604, 615 (1985) (specifying insulation criteria). The Kapurs do not cite any authority for their contention that limited partner or LLC member insulation may not be established by a binding letter agreement. See Application for Review at 5.

infer intent to deceive the Commission when information is elsewhere disclosed or available in its records,"⁶⁵ which is the case here.

⁶⁵ *Second Reconsideration Order* at par. 19 (citations omitted).

CONCLUSION

“[I]n considering challenges to pending applications, the Commission need not allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests.”⁶⁶ The Kapurs’ allegations have been found – three times – to be without merit. Far beyond the proverbial second bite—they have nibbled this apple to the core.

The Application for Review should be dismissed or denied forthwith.

Respectfully submitted,

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⁶⁶ *Radio Carrollton*, 69 F.C.C.2d 1138, 1150 (1978) (internal quotation marks, brackets and citation omitted).

CERTIFICATE OF SERVICE

I, Mary Pasternack, certify that on this 28th day of January 2016, I served copies of the foregoing Opposition to Application for Review by causing them to be delivered by first class, postage prepaid U.S. mail to the following:

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