



Federal Communications Commission
Washington, D.C. 20554

September 4, 2019

In Reply Refer to:
1800B3-IB

Ryan Greig, President
San Tan Educational Media
Suite 102-116
550 W. Baseline Rd.
Mesa, AZ 85210

In re: **KFXY-LP, Mesa, AZ**
Facility ID No. 192016
File Nos. BLL-20170710AAT
BPL-20170911ADI
BTCL-20171004AAB
BPL-20180117ACV
BLSTA-20171213AAB
BLSTA-20181119AAH
Petition for Reconsideration

Dear Mr. Greig:

The Media Bureau (Bureau) and San Tan Educational Media (San Tan), licensee of silent Low Power FM (LPFM) station KFXY-LP, Mesa, Arizona (Station), have entered into a Consent Decree to resolve various licensing matters.¹ In the Consent Decree, San Tan admits that it violated several Commission rules (Rules) and provisions of the Communications Act of 1934, as amended (Act) and agrees to pay a civil forfeiture and to undertake a compliance plan to prevent future violations. The Bureau agrees in the Consent Decree to grant in part San Tan's petition for reconsideration² of a June 25, 2018 Decision which cancelled the Station's license, deleted its call letters, and dismissed and/or denied four contested applications.³ The Bureau has reviewed filings from 1TV.com (1TV) and Len Novin (Novin), which originally brought some of the violations to our attention.⁴ As explained below, we have determined that the violations are sufficiently redressed in the Consent Decree and do not disqualify San Tan from holding a broadcast license. For the reasons discussed below we grant reconsideration in part, reinstate the Station's license and call sign, restore and grant San Tan's application for transfer of control, restore

¹ The Consent Decree also addresses underwriting violations before the Commission's Enforcement Bureau (EB), which is also party to the Consent Decree.

² See San Tan Petition for Reconsideration (rec. July 23, 2018) (Petition).

³ See Ryan Greig, Letter Decision (June 25, 2018) (June Decision).

⁴ 1TV is licensee of KBSZ(AM), Apache Junction, Arizona and Novin owns the Station's last transmitter site (Novin Site) (collectively, Objectors). The Objectors did not oppose San Tan's instant Petition but alleged, at earlier stages of this proceeding, that San Tan violated the Rules in a manner that was disqualifying. Their filings were directed at several different San Tan applications to license, modify, and transfer control of the Station. See *infra*, notes 5, 7; 1TV Petition for Reconsideration (rec. Aug. 9, 2017 against License Application) (1TV Reconsideration Petition), *supplemented by* 1TV Petition for Order to Immediate Cease Unauthorized Broadcast Operation (Aug. 25, 2017) (Cessation Petition); 1TV Informal Objection (rec. Sept. 19, 2017 against First Modification Application); 1TV Petition to Find STEM Unqualified to Hold a Broadcast Authorization (rec. Oct. 5, 2017) (Qualification Petition); 1TV Informal Objection (rec. Oct. 16, 2017 against Transfer Application); Novin Informal Objection (rec. Mar. 20, 2018 against Second Modification Application and raising arguments against other San Tan applications) (Novin Objection). See also Novin Reply to Opposition (rec. May 2, 2018) (Novin Reply); Novin Supplement (June 25, 2018) (collectively, Objections).

and grant San Tan's application for special temporary authority (STA) to remain silent, restore and grant the Objections in part and otherwise deny the Objections.

Background. The Station was first licensed in 2015. San Tan filed applications in 2017 and 2018 to license the Station at the Novin Site and to relocate to other sites.⁵ Objectors raised multiple issues, one of which was an alleged unauthorized transfer of control of San Tan in late 2015/early 2016. In response, San Tan acknowledged that its original governing board, consisting mostly of the family of San Tan's original President, moved out of the area shortly after the station was first licensed, and that existing volunteers assumed control without notifying the Commission.⁶ San Tan sought to correct the matter by filing the Transfer Application approximately two years after the transfer of control occurred.⁷

The Bureau's June Decision dismissed the Transfer Application and cancelled the Station's license. The Bureau determined that the sudden, 100% change in San Tan's board of directors was fatal, resulting in a loss of the Station's license because it amounted to a failure to meet a condition of the original permit grant.⁸ The Bureau did not reach Objectors' other allegations, which became moot upon cancellation of the license. San Tan, in its Petition, challenges the cancellation and seeks license reinstatement. San Tan has, however, admitted in the Consent Decree that it violated: (a) section 73.865(e) of the Rules by undergoing a non-mission-altering transfer of control without timely filing an application for Commission consent on Form 316;⁹ (b) section 301 of the Act and section 73.1350 of the Rules by constructing and operating a tower and antenna that were each of a lower height than authorized; and (c) section 1.17 of the Rules by falsely certifying to have constructed in accordance with its permit,¹⁰ under the signature of a person who was then no longer affiliated with San Tan, as a result of carelessness or negligence without any intent to deceive. We will examine the impact of these violations.

Transfer of Control. The Bureau's license cancellation relied upon section 73.865(c) of the Rules, which prohibits transfers or assignments of LPFM licenses for three years from the date of issue.¹¹ San Tan argues on reconsideration that the Bureau's reading of section 73.865(c) conflicts with section 73.865(e) which deems LPFM board turnover as insubstantial even if the change occurs suddenly.¹² San Tan emphasizes that the transfer of control did not alter San Tan's mission.¹³ We agree that the June Decision did not adequately reconcile sections 73.865(c) and 73.865(e) as those provisions apply to the

⁵ See File Nos. BLL-20170710AAT (filed July 10, 2017) (License Application), BPL-20170911ADI (filed Sept. 11, 2017) (First Modification Application), BPL-20180117ACV (Second Modification Application) (filed Jan. 17, 2018).

⁶ June Decision at 3-4.

⁷ See File No. BTCL-20171004AAB (filed Oct. 4, 2017) (Transfer Application).

⁸ The change in San Tan's board composition occurred within a required three-year LPFM holding period whereas the Station's construction permit was conditioned upon compliance with the Rules, including the three-year holding period. See 47 CFR § 73.865(c); June Decision at 4. The Bureau acknowledged that the Commission treats routine LPFM board turnover as insubstantial because LPFM licensees are often volunteer organizations that commonly experience turnover of board members in the regular course of business. June Decision at 3. However, the Bureau did not view San Tan's circumstances as routine or insubstantial – *i.e.*, a sudden, 100-percent, unauthorized transfer during the holding period following what then appeared to be the original board's abandonment of the Station. The original board members could not retain control of the Station because they had moved about 1,000 miles away from the area.

⁹ San Tan has acknowledged that its original governing board, consisting mostly of the family of San Tan's original President, Christopher Shon White, moved out of the area shortly after the station was first licensed, and that existing volunteers assumed control without notifying the Commission. San Tan sought to correct the matter by filing an application approximately two years after that board change seeking Commission approval.

¹⁰ License Application, Section II-Legal, Question 1, Section III-Application to Cover a Construction Permit, Question 2.

¹¹ 47 CFR § 73.865(c).

¹² Petition at 1-3, citing 47 CFR § 73.865(e). San Tan also disputes MB's characterization of the old board as "abandoning" the Station. Petition at 5.

¹³ San Tan's stated mission is to train people wishing to enter the broadcast industry and to provide an outlet for community voices and music. See File No. BNPL-20131017AAJ, Exh. 2 (filed Oct. 17, 2013). A San Tan officer who served on the original board and who re-joined the board after the change, submits a statement verifying that the organization's mission has remained the same throughout. See Petition, Exh. E.

facts of this case.¹⁴ Accordingly, we grant reconsideration of that aspect of the June Decision.¹⁵ However, as San Tan admits in the Consent Decree, section 73.865(e) requires licensees to obtain Commission consent to a transfer of control by filing FCC Form 316 and San Tan failed to make that filing in a timely manner. We find that the Consent Decree provides appropriate redress for that violation by imposing a civil penalty and requiring San Tan to develop and follow a compliance plan for future transfers and assignments.

Unauthorized Construction, Unauthorized Operation, and False Statement. Objectors also alleged unauthorized construction, unauthorized operation, and false statements in connection with San Tan's applications to license facilities at the Novin Site and to relocate.¹⁶ The staff dismissed those matters as moot. Although San Tan is no longer pursuing those applications, the allegations are no longer moot because our grant of partial reconsideration could lead to reinstatement of the license. The allegations are of a type appropriately considered in connection with determining an applicant's basic qualifications to hold a broadcast license. We will, thus, restore the Objections and consider whether these matters affect San Tan's qualifications to be a Commission licensee.

Section 301 of the Act and section 73.1350 of the Rules prohibit the operation of a broadcast station except under, and in accordance with, a Commission-granted authorization.¹⁷ Section 73.1745(a) further prohibits the operation of a broadcast station at variance from the terms of the Station's authorization.¹⁸ A licensee may, pursuant to section 73.1765, request special temporary authority (STA) to operate at variance for a limited time.¹⁹ However, the licensee must request STA ten days prior to beginning such operation.²⁰ LPFM licensees making station modifications must, pursuant to section 73.875(b)(3), obtain a construction permit for any change in antenna height more than two meters above or four meters below that authorized.²¹

The Bureau authorized San Tan to modify its licensed facilities by moving to the Novin Site and constructing a 30-meter (95.1-foot) tower with an antenna center of radiation at 29 meters (98.4 feet).²² San Tan certified in the License

¹⁴ The Commission substantially revised section 73.865 of the Rules in 2007. The Commission added section 73.865(e) to allow a sudden major change in an LPFM organization's board of directors to be deemed insubstantial, subject to the filing of an FCC Form 316. The Commission reasoned that such flexibility was appropriate due to the nature of the LPFM service and the volunteer boards that oversee LPFM stations. *See Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, MM Docket No. 99-2, 22 FCC Rcd 21912, 21918, paras. 12-13 (2007) (*Third LPFM Order*). The Commission simultaneously added the LPFM holding period provision, section 73.865(c). That provision flatly prohibits any assignment or transfer of an LPFM license within the first three years of operation. *Id.* at 21919, para. 17. However, the Commission did not discuss the interplay between section 73.865(c) and 73.865(e) when it adopted those two provisions. The Decision implicitly assumed the provisions stood apart, so that a major board change could not occur in the first three years of operation. Although the Commission could have taken that position explicitly when it adopted those provisions, it did not do so and parties such as San Tan were not given fair notice that a major board change within the first three years of operation would be fatal to the station's license. *See, e.g., Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000); *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985).

¹⁵ Because San Tan demonstrated local status through its headquarters rather than by the residences of its board members, the White family's move and board transfer would have no impact on San Tan's local qualifications provided that San Tan continuously maintained a local headquarters within ten miles of its transmitter site. *See* 47 CFR § 73.853(b)(1)-(2). San Tan has clarified that it maintained a local headquarters both before and after the White family's November 2015 move and continued to do so until November 2017 when San Tan was evicted from a local headquarters located at the Novin Site. San Tan states that it re-established a local headquarters in July 2019 and remained local in the interim because all of its board members were local during that period. *Id.*

¹⁶ *See* License Application, First Modification Application, Second Modification Application.

¹⁷ 47 U.S.C. § 301; 47 CFR § 73.1350.

¹⁸ 47 CFR § 73.1745.

¹⁹ *Id.* § 73.1765.

²⁰ *Id.* *See South Seas Broad. Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 23 FCC Rcd 6474, para. 2 (MB 2008).

²¹ 47 CFR § 73.875(b)(3).

²² *See* File No. BPL-20170206ACD (granted Feb. 16, 2017) at 2 (February Permit).

Application that it had constructed as authorized.²³ However, Objectors have shown and San Tan now admits that San Tan constructed facilities approximately six meters lower in height without requesting STA.²⁴ San Tan's claimed belief that an STA was unnecessary was based on an erroneous theory.²⁵ Its non-conforming facilities were unauthorized, and its certification of compliance false.

We find that the Consent Decree civil penalty and plan for future compliance with construction requirements provides an appropriate response to San Tan's unauthorized construction/operation and false statement. We reject Objectors' argument that the violations trigger section 73.854 of the Rules which disqualifies any LPFM applicant who has engaged in "unlicensed operation of any station in violation of section 301" of the Act.²⁶ Objectors erroneously equate San Tan's actions with those of a class of LPFM applicants that are disqualified from receiving permits due to previously unlicensed operations.²⁷ Disqualification of such applicants was a targeted response to "pirate" radio operations and intended to exclude such "pirates" for lack of character.²⁸ San Tan was not an unlicensed "pirate" but, rather, a licensee that had been found qualified in the LPFM service, held a permit to modify a licensed station, and constructed at the authorized site. San Tan's failure to conform to the permit's height specifications does not, standing alone, call its basic qualifications into question.

We also do not accept Objectors' allegations that San Tan's false certification is disqualifying as a misrepresentation to the Commission²⁹ or an abuse of process.³⁰ The type of conduct that is disqualifying

²³ See License Application, Questions II(1), III(2).

²⁴ Specifically, San Tan constructed a 24-meter (79.35-foot) tower with a center of radiation for the two-bay antenna of 22.5 meters (73.8 feet). See Declaration of Dr. Gene Wisniewski (Aug. 7, 2017) (Exh. to 1TV Reconsideration Petition) (Wisniewski Decl.); Report of Vaughn Land Surveying, Inc. (July 21, 2017) (Novin Objection, Exh. 6). Objectors also show that while San Tan's tower, as constructed, was shorter than approved by the Commission, it was taller than authorized by local authorities. See note 30 *infra*.

²⁵ San Tan states that it believed that its construction was permissible because the Rules permit a "4-meter margin of error." See San Tan Opposition to 1TV Reconsideration Petition at 2 (Sept. 5, 2017). San Tan is apparently referencing section 73.875(b)(3), which allows downward antenna modifications within four meters of that authorized. 47 CFR § 73.875(b)(3). However, that rule's permissible, four-meter height difference would not provide any authority for San Tan's construction, which was at a greater variance of six meters.

²⁶ 47 CFR § 73.854, codifying *Making Appropriations for the Government of the District of Columbia for Fiscal Year 2001 Act*, Pub. L. No. 106-553, 114 Stat. 2762, section 632(a)(1)(B) (2000).

²⁷ See 47 CFR § 73.854; *Ruggiero v. FCC*, 317 F.3d 239 (D.C. Cir. 2003). See also Novin Objection at 2-3; 1TV September Objection at 4; 1TV Reply (Nov. 27, 2017) at 1-4. We reject 1TV's allegation that San Tan submitted the false information because it would not otherwise have qualified for a needed second-adjacent channel waiver. See 47 CFR § 73.807. That allegation is based on the need for the Station's signal to clear a nearby building so as to not cause interference to the occupants therein, but San Tan has shown that the building at issue is San Tan's own studio and, therefore, that it is not required to protect the signals of adjacent channels within that location. San Tan Opposition to 1TV Reconsideration Petition at 2.

²⁸ See *Ruggiero v. FCC*, 317 F.3d at 247.

²⁹ *Policy Regarding Character Qualifications in Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees, and Licensees*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1210-11, paras. 60-61 (1986) (*1986 Character Policy Statement*) (subsequent history omitted). Misrepresentation is a false statement of material fact made with intent to deceive the Commission. *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *LUJ, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 16980, 16982, para. 5 (2002); *Fox River Broad., Inc.*, Order, 93 FCC 2d 127, 129, para. 6 (1983). An intent to deceive may be inferred from a false statement of fact coupled with proof that the party making it had knowledge of its falsity. *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991). Intent may also be inferred from motive. *Joseph Barr*, Memorandum Opinion and Order, 10 FCC Rcd 32, 33, para. 6 (Rev. Bd. 1994). Absent such intent, the submission of erroneous information through carelessness, inadvertence, or even gross negligence does not constitute misrepresentation. *Stockholders of CBS, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 3733, 3753, para. 40 (1995), *aff'd sub nom. Serafin v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998).

³⁰ Objectors also allege a broader "pattern of deception," including misrepresentation to local authorities. See Novin Objection at 2; Novin Reply at 3-4; 1TV Reconsideration Petition at 8-9. While San Tan constructed lesser facilities than

involves actions that would impair the Commission's ability to rely upon an applicant's truthfulness, including false statements to the Commission with an intent to deceive,³¹ because apparent "[m]isrepresentation and lack of candor raise immediate concerns as to whether a licensee will be truthful in future dealings with the Commission."³² Misrepresentation has been construed to comprise "a false statement of fact made with intent to deceive," and lack of candor is "concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive."³³ Intent to deceive is established if a licensee knowingly makes a false statement³⁴ and can also be inferred when the surrounding circumstances clearly show the existence of intent to deceive.³⁵ The Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency.³⁶

In this case, the circumstances surrounding San Tan's certification do not evidence such a clear intent to deceive. This is because San Tan's February Permit did not expire until August 16, 2018, when it still had over a year to construct properly or to file a modification application for Commission approval and, thus, to submit a truthful certification when it submitted the false certification on July 10, 2017.³⁷ It also had the option of seeking STA to operate the facilities temporarily as constructed. Accordingly, we cannot conclude that San Tan's erroneous certification of authorized construction resulted from a deliberate intent to deceive rather than carelessness or gross negligence. We reach a similar conclusion regarding San Tan's incorrect submission of that certification under the name of San Tan's original President well after he had left the organization.³⁸ Even absent an intent to deceive, however, a false statement of fact, false certification, or material factual omission to the Commission may constitute an actionable violation

approved by the Commission, it apparently constructed greater facilities than approved by the local planning authority. The record reflects that the Maricopa County, Planning and Development Department approved a building permit at the Novin Site for an "Amateur Radio Tower" not to exceed 71 feet (21 meters) and issued a Notice of Order to Comply upon finding that the approximately 79-foot (24-meter) constructed tower was beyond the scope of that permit. *See Declaration of Dr. Gene Wisniewski at 2, para. 12 (Aug. 7, 2017) (Exh. to 1TV Reconsideration Petition) (Wisniewski Declaration); Notice and Order to Comply, Maricopa County, Planning and Development Department, Code Compliance Division, Case No. V201701249 (Nov. 22, 2017) (filed as Novin Objection, Exh. 3); San Tan Building Activity Application, File No. B201703327 (rec. Apr. 21, 2017) at 12 (filed as Cessation Petition, Exh. 2).*

³¹ *See Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) (*Contemporary Media*); *1986 Character Qualifications Policy Statement*, 102 FCC 2d at 1190-91, para. 23.

³² *Commercial Radio Service, Inc., Timothy M. Doty*, Order to Show Cause, 21 FCC Rcd 9983, 9986, para. 12 (2006) (*CRS Order*), citing *1986 Character Qualifications Policy Statement*, 102 FCC 2d 1179, 1210-11, para. 60.

³³ *CRS Order*, 21 FCC Rcd at 9986, para. 12, citing *Fox River Broad., Inc.; American Communications Company*, Order, 93 FCC 2d 127, 129, para. 6 (1983).

³⁴ *CRS Order*, 21 FCC Rcd at 9986, para. 12; cf. *American International Development, Inc., Phoenix; KXIV, Inc.; Herbert W. Owens, Jr.*, Memorandum Opinion and Order, 86 FCC 2d 808, 816, para. 18 n.39 (1981), *aff'd sub nom. KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983) (deeming *absence* of motive to be entirely relevant to issue of misrepresentation).

³⁵ *CRS Order*, 21 FCC Rcd at 9986, para. 12, citing *Leflore Broad. Co. v. FCC*, 636 F.2d 454, 461-62 (D.C. Cir. 1980).

³⁶ *Contemporary Media*, 214 F.3d at 196.

³⁷ Moreover, whereas unlicensed stations face deletion if they fail to meet their construction deadline, the instant Station already held a license and would only need to apply for a replacement permit. *See* 47 CFR § 73.3598(e). Also, the Station had not then been off the air for any appreciable period at that time, so there was no impending risk of automatic license expiration for one year of silence pursuant to section 312(g) of the Act, 47 U.S.C. § 312(g).

³⁸ San Tan submitted the certification under the nominal signature of White, San Tan's original President, who had not been affiliated with San Tan for over a year and, thus, who could not have reviewed the application. 1TV argues that San Tan was trying to conceal its transfer of control. *See Qualification Petition at 5.* We find no evidence of an intent to conceal but, rather, carelessness, as reflected in San Tan's failure to inform its consultant of the change in its officers and to verify the accuracy of the name that the consultant included on the application.

of section 1.17 of the Rules if the applicant does not provide a reasonable basis for believing that the statement or certification is correct and not misleading.³⁹ The Consent Decree addresses that violation.

Accordingly IT IS ORDERED that the Petition for Reconsideration filed by San Tan Educational Media (San Tan) concerning cancellation of the license for KFXV-LP, Mesa, AZ, deletion of its call sign, and dismissal of its related applications **IS GRANTED TO THE EXTENT NOTED HEREIN**.

IT IS FURTHER ORDERED that call sign KFXV-LP and the Station's underlying license (File No. BLL-20150527ACT) **ARE REINSTATED**.

IT IS FURTHER ORDERED that the application to license facilities constructed at the Novin Site (File No. BLL-20170710AAT) and to modify the facilities at different sites (File Nos. BPL-20170911ADI and BPL-20180117ACV) **SHALL REMAIN DISMISSED** because San Tan is no longer pursuing those facilities.

IT IS FURTHER ORDERED that the application to transfer control of San Tan (File. No. BTCL-20171004AAB) **IS RESTORED AND GRANTED**.

IT IS FURTHER ORDERED that the Objections by 1TV.com and Len Novin **ARE REINSTATED, GRANTED TO THE EXTENT NOTED HEREIN**, and otherwise **DENIED**.

IT IS FURTHER ORDERED that San Tan's application for continued special temporary authority to remain silent (File No. BLESTA-20180514ACA) **IS RESTORED AND GRANTED** and that pursuant to section 312(g) of the Act,⁴⁰ KFXV-LP shall upon the effective date of the Consent Decree be afforded the period of four months, 26 days which remains on its permitted one-year of silence.

IT IS FURTHER ORDERED that San Tan's additional application for special temporary authority to remain silent (File. No. BLSTA-20181119AAH) **IS DISMISSED AS MOOT**.

Sincerely,



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³⁹ See 47 CFR § 1.17(a)(2); *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, Docket No. GC 02-37, Report and Order, 18 FCC Rcd 4016, 4017, para. 5 (2003) (subsequent history omitted). See also 47 CFR § 73.1015 ("No applicant ... shall ... in any application, pleading, or report or any other written statement submitted to the Commission, make any ... willful material omission bearing on any matter within the jurisdiction of the Commission.").

⁴⁰ 47 U.S.C. § 312(g).