

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

In re Applications of

| | | |
|-----------------------------|---|--------------------|
| Tallgrass Broadcasting, LLC |) | |
| |) | |
| KICA-FM, Farwell, TX |) | BRH - 20130328ATP |
| |) | BALH - 20130509ABV |
| |) | |
| KMUL(AM), Farwell, TX |) | BRH - 20130328ATO |
| |) | BAL - 20130509ABW |
| |) | |
| KKYC(FM), Clovis, NM |) | BRH - 20130530AOV |
| |) | BALH - 20130402ACH |
| |) | |
| KICA(AM), Clovis, NM |) | BRH - 20130530AOT |
| |) | BAL - 20130402ACI |

For Renewal and for Assignment
of Broadcast Licenses,
Farwell, TX and Clovis, NM

To: Chief, Audio Division
Media Bureau

Opposition to Petition to Deny/Informal Objection

Tallgrass Broadcasting, LLC, under the control of its court-appointed receiver, C. David Rhoades ("Tallgrass") and as licensee of the above-referenced radio broadcast stations ("Stations"), hereby submits, by counsel, its opposition to the document filed by Zia Broadcasting ("Zia").

I. Introduction

1. Although filed with the Commission on April 30, 2013 and titled as a "Petition to Deny," the Zia pleading was not, and does not purport to have been, served upon either Tallgrass, in its capacity as the applicant for the renewal of the licenses listed above and for their

assignment to Tejas Broadcasting Ltd., LLC ("Tejas"). Furthermore, its allegations are not supported, as they are required to be, by "affidavits from individuals with personal knowledge of the facts at issue, except for those of which official notice may be taken." *ACC Licensee, Inc. Application for Renewal of License of Television Station, WJLA-TV, Washington, D.C.*, 22 FCC Rcd 18535, 18538 (M. Bur. 2007); 47 U.S.C. § 309(d)(1). Accordingly, Tallgrass presumes that to the extent the Zia filing is considered, it will be as an informal objection,¹ although for present purposes, Tallgrass will refer to it hereafter as the Zia "Petition."²

2. The purpose of the Petition is expressed in its last sentence, wherein it asks that the four Tallgrass stations (KICA and KKYC-FM, Farwell, Texas, and KICA-FM and KMUL, Clovis, New Mexico) "be removed from the table of assignments, and for a determination that these stations qualify and are due permanent darkness." Petition at 3. Zia is the operator of four competing stations in the market (KCLV AM and FM, KTQM-FM and KWKA, all Clovis). Petition at 1.

II. Factual and Procedural Background

3. The Stations were shut down on May 1, 2012, and thus were dark when the Commission granted the application to transfer control of Tallgrass to its receiver, Mr. Rhoades, via a FCC Form 732 dated August 24, 2012. *See, Public Notice*, Report No. 47812 (August 29,

¹ 47 C.F.R. §73.3587.

² Tallgrass was advised regarding the unserved Zia Petition on May 21, 2013 by the Commission's staff, and a copy of same was sent on that date via electronic mail to its attorney. A Public Notice of the Petition was published on May 22, 2013 (Report No. 27994). The document states that it is being filed against "current filings pending" by Tallgrass, which would thus technically refer (as of April 30, 2013) to the renewal of the two Farwell licenses, and the assignment of the two Clovis applications. To the extent that any procedural rules regarding the timing of the Tallgrass Opposition are applicable in light of Zia's failure of service, the Zia pleading's doubtful status as a petition to deny, and the fact that filing periods for oppositions to petitions relating to assignments and renewals are not the same, Tallgrass submits that the longer period applicable to renewals should control. To the extent that a waiver of the Commission's rules is required, Tallgrass hereby requests the same in light of the circumstances related above.

2012).³ The silent authority pursuant to which all four stations were operating was renewed, and all were set to expire at 12:01 a.m. on May 2, 2013.⁴

4. In his capacity as a receiver, Mr. Rhoades is charged with a fiduciary duty to the creditors of Tallgrass.⁵ Thus the receiver's duty and the public interest in maximizing broadcast service to the public could both be served by restoring broadcast operations at the failed Stations, a goal which could only be accomplished by means of a sale to an established broadcaster who could operate them pursuant to a local marketing agreement ("LMA"). Accordingly, after diligent effort, and as reflected in the assignment applications referenced above, a purchase agreement and a LMA were entered into between Tallgrass and Tejas,⁶ which permitted the stations to resume broadcasting between April 26 and May 1, 2013, just before their licenses would have expired pursuant to Section 312(g) of the Communications Act.⁷ As reflected in the file numbers provided in the heading to this pleading, applications to renew the broadcast licenses for the Farwell stations, KICA-FM and KMUL, were filed on March 28, 2013, and the application to assign those licenses to Tejas was filed on May 9, 2013. Applications to renew the Clovis licenses for KKYC(FM) and KICA were filed on May 30, 2013 and the application to assign the licenses to Tejas was filed on April 2, 2013.

³ Mr. Rhoades later surrendered the license for the fifth, and last remaining Tallgrass station, KMUL-FM, on April 17, 2013.

⁴ KICA(AM), Clovis, NM by means of a letter from the Assistant Chief, Audio Division, dated December 27, 2012, and KKYC(FM), Clovis, KICA-FM, Farwell, TX and KMUL(AM), Farwell, by means of letters from the Assistant Chief dated February 20, 2013.

⁵ See, e.g., *Francis v. Buttonwood Realty Co.*, 765 A.2d 437 (R.I. 2001) (receiver has a fiduciary duty to creditors).

⁶ Copies of these agreements were attached to the assignment applications for the Stations referenced above.

⁷ 47 U.S.C. §312(g). As reflected in the FCC Database, Notices of Resumption of Operation were filed for KICA and KICA-FM on April 26, 2013, for KKYC(FM) on April 29, 2013, and for KMUL on May 1, 2013.

III. Legal Analysis

5. The Zia Petition appears to allege the following violations of the Commission's Rules on the part of Tallgrass: that the public inspection file was not at the studios as of April 22, 2013; that the file was not made available in response to a request from a member of the public; that Tallgrass permitted Tejas to operate the stations without a license; that the stations "had no EAS when they went dark, and likely have none now;" that the stations have not recommenced permanent operation; and that one or more unspecified stations have done so "below required power." Objection at pp. 1 - 2 and referenced exhibits. Zia also objects to the Audio Division's previous grant of silent authority to the Stations. Objection at p. 3.

6. The public inspection files for the Stations were initially placed in the Stations' studios on April 29, 2013, and have been maintained at that location ever since. Affidavit of Sam Heigle, attached hereto as Exhibit A, at ¶ 2. Mr. Heigle hand-delivered the public file materials to Mr. Coker, Station Manager at KTQM/KWKA, on April 29, 2013. *Id.* The April 22 attempt by Mr. Coker to view the file occurred several days before the first of the Stations returned to the air, and before their studios -- where public files are required to be maintained (47 C.F.R. §73.3526(b)(1) -- had reopened. Neither the Commission's Rules nor any law or policy of which Tallgrass is aware requires silent stations to maintain a public file -- a practical impossibility, in any case, for stations, such as those at issue herein, that are closed for financial reasons.⁸

7. Tejas has operated the stations pursuant to an LMA, a fact disclosed and documented in the assignment applications referenced in the heading, above. The mere operation of stations

⁸ Even if any had been demonstrated by Zia, "[p]ublic file violations, on their own, do not establish grounds for denial of an application unless intentional misconduct is evident." *Michael Lazarus, Esq.* 26 FCC Rcd 5966, 5970 (M. Bur. 2011). No such misconduct is suggested in the Zia Petition.

pursuant to a LMA does not amount to a transfer of control,⁹ and Zia has not alleged, let alone documented, any action that would, even if proven, establish that such a transfer has occurred.

8. Mr. Rhoades is not in a position to have direct knowledge regarding Zia's claims about the condition and operation of the EAS equipment prior to the time the stations went off the air, and long before he assumed control. For this reason, Zia's allegations in this regard should not affect the outcome of pending applications made by him as the court-appointed official currently in control of the licensee. Zia only speculates regarding the current level of EAS compliance at the Stations, and does not thereby raise an issue that requires a response from Tallgrass.

9. Contrary to Zia's claim, the stations have permanently recommenced operation, a fact that the licensee certified in the notices of resumption of operation for each of the four stations between April 26 and May 1, 2013 referenced in Note 5, above. Two of the stations, KKYC(FM) and KMUL, are operating at temporary reduced power pursuant to Special Temporary Authority. *See*, BSTA-20130425ADX (Letter to Russell Powell from Dale Bickel dated April 29, 2013 and BSTA-20130425ADW (Letter to Russell Powell from Jerome Manarchuk, dated May 1, 2013).¹⁰

10. The remainder of the Zia objection consists of asserted "irregularities in the contract of sale" and alleged employment and contract disputes between past employees of the stations and the Clovis Chamber of Commerce with the previous receiver for Tallgrass, Christopher Oldroyd. Tallgrass cannot respond to Zia's contentions regarding the contract of sale, because it

⁹ See, e.g., *Solar Broadcasting Company, Inc.*, 17 FCC Rcd 5467, 5486 (2002); *WGPR, Inc.*, 10 FCC Rcd 8140, 8141 ¶10 (1995), *vacated in part on other grounds sub nom., Serafin v. FCC*, 149 F3d 1213 (DC Cir 1998).

¹⁰ Zia also appears to find fault at page 3 of its objection to the silent authority previously granted to the Stations, but it is unclear what remedy it may be requesting, or what would be possible. Aside from being moot since the STAs are no longer in effect, Zia's protest reflects its unawareness that silent authority can be granted for financial reasons, as it was in the case of the Stations.

is simply not clear what Zia is trying to convey. In any case, Zia has not suggested how the contract might violate any Commission rule or policy.

11. Zia's assertions regarding the employment claims and breaches of contract alleged against Mr. Oldroyd -- who no longer has any connection with Tallgrass -- are not merely unverified, but irrelevant. The Commission has long held that such disputes should be pursued in courts of competent jurisdiction.¹¹ Furthermore, it is axiomatic that "the Commission generally only considers three types of adjudicated non-FCC misconduct which are not specifically proscribed by the Act or the Rules: (1) fraudulent statements to government agencies; (2) felony convictions; and (3) mass media related violations of anti-competitive and antitrust statutes."¹² The claims raised by Zia have not been adjudicated and do not fall into any of the foregoing categories. Accordingly, even if they had been adjudicated rather than merely alleged, the Zia claims regarding Mr. Oldroyd's conduct would not be relevant to the Tallgrass and Tejas applications.

IV. Conclusion

12. Tallgrass respectfully submits that the Zia Petition has failed to suggest that there have been violations of the Communications Act or the rules and regulations of the Commission involving the Stations which, taken together, constitute a pattern of abuse, or suggest that the grant of the Stations' license renewal applications would not be in the public interest, nor has the Petition raised a substantial and material question of fact sufficient to warrant designation of its renewal applications for a hearing. Zia has failed to allege, let alone prove, any fact that would be sufficient to justify the denial of the assignment applications pending with respect to the

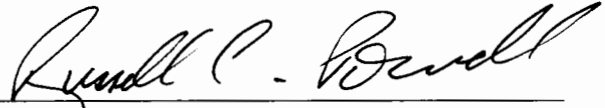
¹¹ See, *Decatur Telecasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 8622 (1992).

¹² See, *Policy Statement Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252, 3252-53 (1990), *modified*, 6 FCC Rcd 3448 (1991), and 7 FCC Rcd 6454 (1992).

Stations. Accordingly, Tallgrass asks that the Zia Petition be denied in its entirety, and that the Tallgrass applications referenced above be granted.

Respectfully submitted,

TALLGRASS BROADCASTING, LLC

By: 

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June 4, 2013

EXHIBIT A

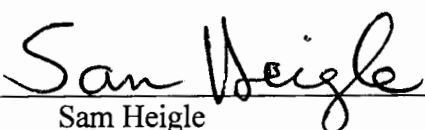
Declaration of Sam Heigle

1. I, Sam Heigle, like my colleague, C. David Rhoades, the Court-Appointed Receiver for Tallgrass Broadcasting, LLC ("Tallgrass"), am a Director of Turnaround Professionals ("Turnaround"), with offices in Tulsa and Oklahoma City, Oklahoma. I have been directly involved in, and have direct knowledge regarding the administration of the four AM and FM broadcast radio stations licensed to Tallgrass in Farwell, Texas (KICA-FM and KMUL) and Clovis, New Mexico (KICA and KKYC) (the "Stations").

2. The public inspection files for all four of the Farwell and Clovis stations at issue were initially placed in the Stations' studios at 621 N. Main, Unit C, Clovis, New Mexico on April 29, 2013, and have been maintained there ever since. I also hand-delivered the public file materials for the Stations to Mr. Coker, Station Manager at KTQM/KWKA, on April 29, 2013.

I swear under penalty of perjury under the laws of the State of Oklahoma that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 4th day of June, 2013.



Sam Heigle

Certificate of Service

I, Russell C. Powell, hereby certify that the foregoing Opposition to Petition to Deny/Informal Objection, is being served on the following via First Class Mail this 4th day of June, 2013:

Rick Keefer, General Manager
Zia Broadcasting
2112 N Thornton Street
Clovis, NM 88101



Russell C. Powell