

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

In the Matter of)	
)	
KAXT, LLC)	File No BALDTA-20130211ACT
(Assignor))	Facility ID No. 37689
)	
and)	
)	
OTA Broadcasting (SFO), LLC)	
(Assignee))	
)	
For Consent to Assign the License of Class A)	
Station KAXT-CD, San Francisco-San Jose,)	
California)	
)	File No. BRDTA-20140731ANH
In re Application of)	Facility ID No. 37689
)	
OTA Broadcasting (SFO), LLC)	
)	
For Renewal of the License of)	
Television Broadcast Class A Station KAXT-CD,)	
San Francisco- San Jose, California)	

MEMORANDUM OPINION AND ORDER

Adopted: December 11, 2015

Released: December 11, 2015

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. The Video Division ("Division") has before it a Petition for Further Reconsideration ("Further Reconsideration Petition") filed on April 27, 2015 by Ravi Kapur, Nalini Kapur, and Rishi Kapur (collectively, "Petitioners" or "Kapur"), as well as a related Petition for Reconsideration ("Reconsideration Petition") also filed by the Petitioners on the same date. In the Further Reconsideration Petition, Petitioners seek further reconsideration of two decisions: (1) the July 11, 2014 decision granting an application to assign the license of station KAXT-CD, San Francisco-San Jose, California (the "Station") from KAXT, LLC ("KAXT") to OTA Broadcasting (SFO), LLC ("OTA") ("Assignment Application"),¹ and (2) the March 26, 2015 decision that denied the reconsideration of the grant of the Assignment Application.² The Reconsideration Petition seeks reconsideration of the portion of the *Reconsideration MO&O* that granted OTA's application for renewal of the Station's license ("Renewal

¹ *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) ("MO&O"). Petitioners had filed a Petition to Dismiss, Deny, or, in the Alternative, Hold Application in Abeyance ("Assignment Petition").

² *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) ("Reconsideration MO&O").

Application”). For the reasons set forth below, we deny both the Further Reconsideration Petition and Reconsideration Petition.

II. BACKGROUND

A. Prior Decisions

2. *MO&O*. Petitioners initially filed the Assignment Petition to challenge the initial Assignment Application on the basis that the application and underlying Asset Purchase Agreement (“APA”) was invalidly signed by Warren Trumbly on behalf of KAXT, on the basis that Trumbly allegedly did not have the legal authority to enter into the APA that assigned ownership of the station to OTA. This private ownership dispute between the Kapurs and Trumbly was the subject of arbitration while the Assignment Application was pending, and an arbitration decision was issued prior to action on the Assignment Application. The *MO&O* noted that an arbitrator determined that the APA was indeed validly signed, restated the Commission’s policy not to adjudicate private contractual matters, and determined that there was no reason not to proceed with the review of the Assignment Application.³

3. The *MO&O* also denied the Kapurs’ allegation that OTA lacked the necessary character qualifications to purchase the Station. The Kapurs pointed to a letter they received from OTA’s counsel urging the Kapurs to withdraw the Petition in the wake of the arbitrator’s decision, and stating that OTA was prepared to pursue all available legal and equitable remedies against the Petitioners, including tortious interference and malicious prosecution.⁴ However, we held that all applicants may enforce their contractual rights by pursuing all available legal relief without impermissibly infringing upon petitioners’ rights, and that we were not persuaded that OTA’s correspondence discouraged access to the Commission or participation by the public.⁵

4. *Reconsideration MO&O*. In the *Reconsideration MO&O*, we found all of Petitioners’ arguments for reconsideration to be reiterations of previously denied arguments or otherwise unpersuasive, and therefore denied the Reconsideration Petition.⁶ First, in response to the contention that we had acted prematurely on the Application by granting the assignment prior to exhaustion of the full appellate process in the arbitration proceeding, we pointed out that the Petitioners did not cite any precedent for their contention, and we explained how the initial determination to process the Application without waiting for all judicial processes to be exhausted was consistent with prior cases.⁷ Second, the *Reconsideration MO&O* found that the Petitioners’ contentions that the *MO&O* made insupportable factual findings with regard to OTA’s allegedly harassing correspondence has no merit, and concluded that this was an attempt to re-argue their initial assertion of intimidation without citing any new case law or facts.⁸ Accordingly, we denied this reiteration of a previously-considered argument.⁹ Third, we

³ *Id.* at 8268-9 (citations omitted).

⁴ *Id.* (citing Assignment Application Informal Objection, Att. A, Letter from C. William Phillips, Counsel for OTA, to Randolph Gaw, Counsel for the Kapurs (dated Feb. 17, 2014) (“OTA Feb. 17, 2014 Letter”).

⁵ *Id.* at 8269-70. The *MO&O* cited *Fort Collins*, in which the Commission rejected a similar charge of harassment and held that an applicant’s advising a petitioner that it might file suit if it does not withdraw its petitions does not justify a determination that a licensee lacked the requisite character qualifications. *Fort Collins Broadcast Co., Inc.*, Memorandum Opinion and Order, 38 FCC 2d 707, 711-12 (1972) (“*Fort Collins*”).

⁶ *Reconsideration MO&O* at 2694.

⁷ *Reconsideration MO&O* at 2694-5 (citations omitted). We emphasized that our grant was permissive only, and that the Applicants consummated with the risk that an appellate court may overturn the initial court decision. *Id.* at 2694.

⁸ *Id.* at 2695.

alleging noninvolvement in an “intramural squabble” to be untrue, where OTA was actively working behind the scenes with the Trumbly Group during the arbitration to gain an advantage over the Kapurs.²⁵

11. *Consolidated Opposition to Further Reconsideration Petition and Reconsideration Petition.* OTA filed an opposition to the Further Reconsideration Petition and Reconsideration Petition, and argues that OTA cannot be bound by any findings made in that case because it is not even a party to that litigation; because the Petitioners themselves are not parties to the litigation; and because the litigation does not concern the authority of KAXT to sell the Station to OTA or the validity of that sale.²⁶ OTA also disagrees that the *Diya TV Statement* constitutes a “new” fact or “changed circumstance” under section 1.106 of the Commission’s rules, because (1) the litigation itself predates the issuance of the *MO&O*; (2) the *Diya TV Statement* is still subject to appellate review and therefore, by Petitioners’ own logic, should not be a basis for Commission action; and (3) the purported basis for Petitioners’ non-compliance with the Commission’s ownership criteria is a document filed by OTA more than two years ago.²⁷

12. *Consolidated Reply.* The Petitioners filed a Consolidated Reply on May 22, 2015, reiterating their previous arguments and also raising new allegations. They emphasize that nowhere in the Consolidated Opposition does OTA dispute or deny the *Diya TV Statement*’s findings that OTA directly advised and assisted the Trumbly Group to defeat the Petitioners in the arbitration dispute, which confirms that OTA misrepresented key facts about OTA’s involvement in the arbitration.²⁸ They also reiterate that OTA has improperly insulated former OTA President/CEO Todd Lawyer from attribution, where the relevant forms and Commission rules require such insulation through enabling (organizational) documents signed by all parties, rather than a two-party letter.²⁹ Petitioners also cite for the first time to a May 14, 2013 Second Amended and Restated Limited Liability Company Agreement (“Second LLC Agreement”) filed on August 11, 2014, as part of a section 73.3613 submission relating to the Station, and question whether what they see as inexplicable redactions to that document relate to OTA’s state of mind on the Lawyer insulation issue.³⁰ Petitioners attempt to dismiss OTA’s criticism of Petitioners for not bringing the insulation issue to the Bureau’s attention earlier by arguing that it was OTA’s job to self-report this issue.³¹ Lastly, Petitioners argue that OTA’s silence in response to allegations of character-related false certifications on other applications speaks volumes, and that OTA has not challenged the accuracy of the findings in the *Diya TV Statement* with regard to bullying.³²

13. *Supplement to Consolidated Opposition.* On August 5, 2014, OTA filed a Supplement responsive to the Petitioners’ contentions that the Commission should have awaited the outcome of ultimate judicial review of a private contractual dispute before taking action on the underlying Applications.³³ Specifically, OTA argues since a California state appellate court released an order on May 14, 2015 denying an appeal, and issued a remitter on July 14, 2015, the underlying arbitration ruling

²⁵ *Id.* at 3 (citing *Diya TV Statement* at 10).

²⁶ Consolidated Opposition at 2-3.

²⁷ *Id.* at 3-4.

²⁸ Consolidated Reply at 4-5.

²⁹ *Id.* at 5.

³⁰ *Id.* at 6.

³¹ *Id.* at 7.

³² *Id.* at 8-9.

³³ Supplement in Support of Consolidated Opposition to “Petition for Further Reconsideration” and Petition for Reconsideration at 1-2 (citing *Kapur v. Trumbly*, Cal. App. 3 (filed May 14, 2015)).

that the majority owners of KAXT were authorized to approve a sale of KAXT-CD is now final and unappealable.³⁴

III. DISCUSSION

14. Petitions for reconsideration are appropriate where the petitioner demonstrates a material error or omission in the underlying order or raises additional facts or arguments not known or not existing until after the petitioner's last opportunity to present such matters, and could not, through the exercise of ordinary diligence, been raised prior to the last opportunity, or the Commission determines that consideration of the facts is required in the public interest.³⁵ A petition for reconsideration that simply reiterates previously considered arguments will be denied.³⁶ Arguments in a petition for reconsideration being raised for the first time will be considered only if they are based on changed circumstances or additional facts not known or existing at the time of petitioner's last opportunity to present such matters, or if consideration of such arguments is required to serve the public interest.³⁷

15. We find Petitioners' arguments for reconsideration to be reiterations of previously denied arguments, not based on changed circumstances, or otherwise unpersuasive, and we therefore deny the Further Reconsideration Petition and the Reconsideration Petition. In particular, considering the record as a whole, we conclude that the Petitioners have failed to raise a substantial or material question of fact regarding OTA's fitness to hold a Commission license. In rejecting the latest of multiple challenges to the assignment and renewal of the Station's license, which include express reiterations of previously-considered arguments,³⁸ we remind Petitioners 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.³⁹

16. As an initial matter, we agree in part with the Petitioners that the issuance of the *Diya TV Statement* and its findings disclosed changed circumstances not known to the Petitioners previously, and could not have been known by the petitioner through the exercise of ordinary diligence, until after the petitioner's last opportunity to present such matters. In particular, we agree with Petitioners that findings made in that decision, such as the details of OTA's alleged collaboration with the Trumbly Group,⁴⁰ were not known to them before the issuance of that decision on April 1, 2015. We disagree with OTA's challenge to the filing of the Petitions on the bases that OTA cannot be bound by any findings made in the *Diya TV Statement* proceedings because it is not a party to that litigation, and that such litigation is neither

³⁴ *Id.* at 1 (stating that the time has expired to seek further judicial review of the California state appellate court affirmance of the California trial court's decision confirming an arbitrator's conclusion that KAXT was authorized to sell KAXT-CD to OTA) (citations omitted).

³⁵ See 47 C.F.R. § 1.106(c); *Ernesto Bustos*, Memorandum Opinion and Order, 29 FCC Rcd 7311 (Vid. Div. 2014); *EZ Sacramento, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 18257, 18257 (EB 2000).

³⁶ *Saga Communications of Illinois, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 5958, 5959 (MB 2011) ("*Saga*") (rejecting an argument from a petition for reconsideration because it did not raise any new information reflecting changed circumstances, did not present additional facts not known at the time of the last filing, and did not attempt to show anything more than a disagreement with the Commission's finding).

³⁷ See 47 C.F.R. § 1.106(b).

³⁸ See, e.g., Reconsideration Petition at 2 ("For the compelling reasons advance in all of their pleadings in this proceeding, including their Renewal Petition, the Reconsideration Petition, and the Further Petition, Petitioners respectfully request that the Renewal Application not be finally acted upon until these issues are finally resolved.").

³⁹ See 47 C.F.R. § 1.106(p)(3).

⁴⁰ See, e.g., Further Reconsideration Petition at 5 (citation omitted).

a “new” fact or “changed circumstance” within the contemplation of section 1.106 of the Rules because: (1) the litigation itself predates at least the issuance of the *MO&O*, and (2) the *Diya TV Statement* is subject to review by the California appellate courts.⁴¹ We emphasize that the court’s issuance of a decision finding facts of conceivable relevance here is what constitutes the changed circumstances that permits the Petitioners to file a petition for reconsideration that is acceptable in part, and that the findings in that case are not unassailable “facts” to which we are bound.

17. However, we disagree with the Petitioners that the changed circumstances or facts disclosed warrant reconsideration of our prior decisions. Petitioners raise two different lines of reasoning in an attempt to explain why the findings of fact in the *Diya TV Statement* warrant a hearing on OTA’s character,⁴² neither of which we find persuasive. First, they contend that OTA’s misrepresentations to the FCC concerning key facts regarding OTA’s involvement in the arbitration raise questions about OTA’s qualifications that require a hearing.⁴³ Specifically, they point to OTA’s assertions in its FCC pleadings that it was “caught in the cross-fire of this intramural squabble” between the Trumbly Group and the Kapurs⁴⁴ as inconsistent with court findings that OTA actively collaborated with the Trumbly Group during the arbitration proceeding between the Kapurs and the Trumbly Group.⁴⁵ We reject this argument as irrelevant. Neither the *MO&O* nor the *Reconsideration MO&O* relied on OTA’s representations about involvement in that arbitration proceeding, so neither decision needs to be reversed or reconsidered; the degree of OTA’s participation in that controversy had absolutely no bearing on our decisions. Moreover, none of OTA’s statements cited by the Petitioners meet the threshold of a misrepresentation. OTA was not a party or intervenor in the arbitrated ownership dispute or its appeals, and regardless of any contact it may have had with the Trumbly Group behind the scenes, OTA’s description of the arbitration between the Kapurs and the Trumbly Group was not inaccurate.

18. We also find Petitioners’ arguments that OTA acted as a “bully” in its collaboration with the Trumbly Group, warranting a reversal of our grant of the assignment and renewal, to be misguided and irrelevant. In the *MO&O*, we rejected Petitioners’ allegations that the OTA Feb. 17 2014 Letter from OTA’s counsel, urging the Kapurs to withdraw their petition to deny where OTA is prepared to pursue all legal remedies, warranted a character qualification hearing. Now, Petitioners argue that the threatening letter from OTA’s counsel “is not an isolated event, but part of a pattern of behavior – OTA not only involved itself in an *unlawful detainer action* against the Petitioners’ Diya-TV, but also moved to throw the Petitioners out of KAXT headquarters with a mere hour’s notice.”⁴⁶ Commission precedent regarding intimidation balances one’s rights to avail itself of the Commissions’ processes against one’s rights to pursue the legal remedies at one’s disposal.⁴⁷ Accordingly, Petitioners’ new claims regarding other forms

⁴¹ Consolidated Opposition at 2-3.

⁴² Evidence of lack of candor, misrepresentation, or felony convictions may raise questions as to whether a licensee possesses the character qualifications to hold a Commission authorization. See, e.g., *Kaye-Smith Enterprises*, Memorandum Opinion and Order, 71 FCC 2d 1402 (1979), *aff’d*, 90 FCC 2d 27 (1982).

⁴³ Further Reconsideration Petition at 6-7; Reply at 4-5

⁴⁴ Further Reconsideration Petition at 6 (citation omitted); see also *id.* at 6 (citing OTA’s additional representation that “OTA has waited patiently for the Kapurs and the controlling members of KAXT to resolve their differences amicably – or have them settled by an arbitrator”) (citation omitted).

⁴⁵ *Id.* at 6-8.

⁴⁶ Further Reconsideration Petition at 6 (citation omitted) (emphasis in original).

⁴⁷ E.g., *Fort Collins*, 38 FCC at 711-12 (“With regard to Fort Collins’ alleged harassment tactics, we must take into account two considerations: (1) licensees, as do all individuals, have the right to pursue any legal remedies they may have at their disposal; and (a) the Act is especially designed so that the Commission’s processes are available to members of the public and, therefore, caution should be exercised by licensees so as not to hinder public participation.”).

of allegedly coercive behavior wholly unrelated to accessing the Commission's processes do not create an actionable pattern of behavior under that precedent – our role is limited to preserving access to the Commission's processes, not adjudicating other allegedly coercive behavior. More broadly, 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 pursue all legal remedies at its disposal.

19. As to Petitioners' remaining arguments concerning Todd Lawyer's guilty plea and the question of his insulation from OTA's activities, we conclude that the Petitioners have not offered any reason for their failure to have raised these arguments earlier in the proceeding, and we therefore dismiss these arguments on procedural grounds, pursuant to Section 1.106(c) of the Commission's rules. Any of these arguments could have been made at the previous stage of these proceedings, and Petitioners provide no basis for a determination that the underlying facts were unknown to them before their last opportunity to present such matters. Specifically, in their Further Reconsideration Petition, the Petitioners cite Lawyer's plea of guilty on February 19, 2013, and an "Insulation Letter" dated February 8, 2013, that various OTA broadcasting subsidiaries filed with regard to other stations, such as a March 11, 2013, filing made by OTA station WEBR-CD.⁴⁸ OTA submitted such filings to the Commission months prior to the Kapurs' filing of their petitions that initiated the *Reconsideration MO&O*.⁴⁹ The Commission has repeatedly held that the *sine qua non* of misrepresentation or lack of candor is intent to deceive the Commission,⁵⁰ and has declined to infer intent to deceive the Commission when information is elsewhere disclosed or available in its records.⁵¹ Moreover, nowhere do the Petitioners claim that such facts were unknowable earlier, or even identify who became aware of these facts and when. We emphasize that the facts surrounding Todd Lawyer's behavior and insulation are wholly independent from the circumstances giving rise to the *Diya TV* litigation.

IV. ORDERING CLAUSES

20. Accordingly, for the reasons discussed above, IT IS ORDERED, That the Petition for Reconsideration filed by Ravi Kapur, Nalini Kapur, and Rishi Kapur IS DENIED.

21. IT IS FURTHER ORDERED That the Petition for Further Reconsideration is DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Barbara A. Kreisman
Chief, Video Division
Media Bureau

⁴⁸ Further Reconsideration Petition at 9 (citations omitted).

⁴⁹ The Kapurs filed their Petition for Reconsideration of the *MO&O* on August 11, 2014, and their Petition to Hold Renewal Application in Abeyance, File No. BRDTA-20140731ANH, on November 3, 2014.

⁵⁰ See, e.g., *Fox River Broadcasting, Inc.*, Memorandum Opinion and Order, 93 FCC 2d 127, 129 (1983).

⁵¹ See, e.g., *Joseph W. Bollinger and Donna M. Bollinger*, Memorandum Opinion and Order, 16 FCC Rcd 18107, 18109 (2001)