



Federal Communications Commission
Washington, D.C. 20554

May 5, 2010

In Reply Refer to:
1800B3-BSH

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In re: **KFUE-FM, Clayton, Missouri**
Facility ID No. 65924
File No. BALH-20091026AAX

**Application for Assignment of License
Petitions to Deny
Informal Objections**

Dear Counsel and Objectors:¹

We have before us the above-referenced application (the “Assignment Application”) seeking approval for the proposed assignment of license of Station KFUE-FM, Clayton, Missouri (the “Station”), from The Lutheran Church – Missouri Synod (the “Church”) to Gateway Creative Broadcasting, Inc. (“Gateway”). On November 30, 2009, The Committee to Save KFUE-FM (the “Committee”) filed a Petition to Deny the Assignment of License, and the Radio Arts Foundation (“RAF”) filed a separate Petition to Deny (together, the “Petitioners”).² Additionally, numerous parties (collectively, the “Objectors”) filed informal objections to the Assignment Application (collectively, the “Informal Objections”). For the reasons stated below, we deny the Petitions to Deny and the Informal Objections, and grant the Assignment Application.

Both Petitions to Deny raise three issues. Petitioners argue that: (1) Gateway is not financially qualified to complete the proposed transaction, contrary to the certification it made in the Assignment Application; (2) the Asset Purchase Agreement (“APA”) for the sale of the Station created an impermissible reversionary interest, in violation of Section 73.1150 of the Commission’s Rules (the “Rules”),³ through a leaseback provision allowing the Church to continue broadcasting classical music on one of the Station’s digital channels after grant of the Assignment Application (“HD Channel Agreement”); and (3) the parties to the APA failed to provide certain material documentation related to the Station sale. Additionally, the Committee’s Petition Supplement alleges a fourth issue, *i.e.*, that the Church failed to comply with Section 73.2090 of the Rules,⁴ which bans discrimination in broadcast transactions, because the station allegedly was “not, in fact, offered for sale to all potential buyers.”⁵ Finally, the Objectors state their strong appreciation for the current programming on KFUE-FM, express concern that the sale of the Station will cause the loss of that format, and ask the Commission to bar the proposed sale to Gateway in order to preserve the classical music format.

Financial Qualifications. Petitioners allege that, despite the affirmative financial certification in the Assignment Application, “it does not appear” that Gateway has sufficient funding to complete the acquisition of KFUE-FM and begin its initial operation, contending that Gateway neither has the necessary cash on hand nor available from a committed source.⁶ An applicant meets the Commission’s financial qualifications requirement by certifying that it has sufficient adequate assets on hand or available from committed sources to

¹ The Commission received objections to the above-captioned assignment application from 54 informal objectors. Each of these individuals will receive a copy of this letter.

² Gateway filed a Consent Motion for Extension of Time on December 14, 2009. On December 16, 2009, the Church filed an Opposition to Petition to Deny and Gateway filed a Consolidated Opposition to Petitions to Deny (“Gateway Opposition”). The Committee filed a Reply to Oppositions to Petition to Deny on December 29, 2009, and RAF filed a Reply to Oppositions to Petition to Deny (“RAF Reply”) on December 30, 2009. The Committee filed a Supplement to Petition to Deny (“Petition Supplement”) on February 16, 2010, and the Church filed a Response to Supplement to Petition to Deny (“Supplement Response”) on March 3, 2010. The Committee filed a Reply to Response to Supplement to Petition to Deny on March 15, 2010.

³ 47 C.F.R. § 73.1150.

⁴ 47 C.F.R. § 73.2090.

⁵ Petition Supplement at 1.

⁶ *See, e.g.*, Committee Petition to Deny at 7.

consummate the transaction and to operate the station for three months without revenue.⁷ “Nothing further typically is required of assignees.”⁸ Nonetheless, in response to Petitioners’ allegations, Gateway’s Opposition identifies both specific funding amounts and sources, in order to substantiate the certification of its financial qualifications. The funding that Gateway itemizes includes escrow funds, pledge commitments, cash on hand, and a loan commitment from Cass Commercial Bank (the “Bank”). In reply, RAF argues that the letter verifying the loan commitment from the Bank, which Gateway obtained after Petitioners challenged Gateway’s certification, “is dated December 9, 2009, so that commitment was apparently also not in place on October 6, 2009 [when Gateway’s president attested to the certification].”⁹ The December 9, 2009, letter from the Bank states, however, that it “reflects our discussions with Gateway this fall, prior to Gateway’s execution of an agreement to acquire KFUF-FM.”¹⁰ In light of the above corroboration, we find that Petitioners fail to make a *prima facie* case that there is any material and substantial question raised concerning Gateway’s financial qualifications.

Reversionary Interest. Petitioners argue that the parties have explicitly agreed to lease KFUF-FM’s digital spectrum back to the Church as part of the consideration for the transaction, and to provide the Church with access to the Station’s facilities after the license has been assigned to Gateway. Specifically, pursuant to the HD Channel Agreement, the APA’s provision makes continued broadcast of classical music available on the Station’s digital channel HD2. This arrangement, Petitioners argue, constitutes an impermissible retained interest in violation of Section 73.1150(a) of the Rules. This rule provides, in part, that “[i]n transferring a broadcast station, the licensee . . . may not reserve the right to use the facilities of the station for any period whatsoever.”¹¹ In response to Petitioners’ allegations, on December 16, 2009, the parties amended the APA to eliminate the HD Channel Agreement in its entirety,¹² thereby making this issue moot.

Provision of Required Documents. Petitioners assert that the APA submitted with the Assignment Application improperly failed to include copies of the HD Channel Agreement, a Promissory Note, a Security Agreement, and other excluded schedules that might be relevant to the Commission’s review. While not admitting error, the parties executed and filed the December 16, 2009, APA First Amendment, which amended the Assignment Application to eliminate the HD Channel Agreement, and included copies of the Promissory Note and the Security Agreement. Additionally, the APA First Amendment identifies all of the schedules related to the APA, and explains the specific basis for not providing each schedule that it did not

⁷ See FCC Form 314, Section III, Question 10 (certification that “sufficient net liquid assets are on hand or are available from committed sources to consummate the transaction and operate the station for three months”).

⁸ *CBS Radio Stations, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 20058, 20062 (2007).

⁹ RAF Reply at 5.

¹⁰ Gateway Opposition, Exhibit 3 at 1.

¹¹ 47 C.F.R. § 73.1150(a).

¹² See First Amendment to Asset Purchase Agreement (“APA First Amendment”) at Section 2.2 (“[Relevant Sections] of the Agreement are hereby deleted in their entirety to reflect the elimination of the HD Channel Agreement from the transaction.”).

submit.¹³ Accordingly, in light of this submission, we find there to be no substantial and material question of fact on this issue.

Allegation of Discrimination. In its Petition Supplement, the Committee alleges that the Church violated Section 73.2090 of the Rules.¹⁴ Section 73.2090 prohibits discrimination on the basis of race, color, religion, national origin or sex against any qualified person or entity in the sale of a commercial broadcast station. To support its claim of a violation, the Committee alleges that: (1) the Church made a decision on February 19, 2009, to sell the Station; and (2) a Church employee, David Strand (“Strand”), then told St. Louis-area media broker Robert Cox (“Cox”) in March of 2009, that the Station was not for sale.¹⁵ We find the Committee’s allegation of a violation of Section 73.2090 is, at best, speculative. Moreover, this unfounded assertion falls short of the requirements of Section 309(d)(1) of the Communications Act of 1934, as amended (“the “Act”) that “specific allegations of fact” are necessary to establish that “grant of the application would be *prima facie* inconsistent with the public interest.”¹⁶ In light of the Committee’s failure to demonstrate, or even allege, any specific discrimination on the basis of race, color, religion, national origin or sex, Section 73.2090 has no relevance to this proceeding, and provides no basis for denial of the Assignment Application.¹⁷

Furthermore, the Church contests those facts that the Committee submits. First, the Church states that the resolution adopted by its Board of Directors at its February 19-20, 2009, meeting did not actually authorize a sale of the Station. Instead, the Church claims, that meeting formally empowered its representatives “to explore and pursue the Church’s options with regard to KFUE-FM, ‘including but not limited to disposing of some or all, or none’ of KFUE-FM’s assets.”¹⁸ The resolution authorizing the sale of the Station, the Church contends, was adopted at an August 20-21, 2009, meeting. The Church also asserts that it had discussions with various interested parties concerning the sale of the Station prior to and after its February 2009 resolution. Additionally the Supplement Response included Strand’s Declaration, in which he recalls that he actually told Cox in March 2009 that the Church was weighing various options. Strand states that this is consistent with what he told other interested parties in that time period.¹⁹ We need not resolve the conflicts between the Committee and Church accounts however, because we find

¹³ These schedules consist of: FCC Licenses; Assumed Contracts; Conflicts (noting that this schedule listed no “conflicts”); Tangible Personal Property; Liens and Title to Personal Property; Exclusions to FCC Licenses (noting that this schedule listed no exclusions); Litigation; Third-Party Consents; Insurance Company; Real Property; and Escrow Agreement.

¹⁴ 47 C.F.R. § 73.2090.

¹⁵ The Committee argues that the statement from Cox on this matter was not available until after the pleading cycle ended, and we should therefore consider the Petition Supplement as newly discovered evidence. We exercise our discretion to consider the merits of the Petition Supplement’s allegation.

¹⁶ 47 U.S.C. § 309(d)(1).

¹⁷ To the extent that the Committee is suggesting that the public interest would be better served by the sale of the Station to a different entity, we note that 47 U.S.C. § 310(d) specifically precludes the Commission from considering assignment to any entity other than the proposed buyer when acting on applications proposing assignment of license.

¹⁸ Supplement Response at 6.

¹⁹ See Declaration of David Strand, Supplement Response, Exhibit 1.

that the Committee fails to allege a *prima facie* case that there is any material and substantial question that the Church has violated Section 73.2090 of the Rules.

Loss of Format. The Objectors state their appreciation for the current KFUFM classical music format, and argue that the loss of this format will harm the public interest. While the Commission appreciates that KFUFM's classical music format has attracted a devoted listenership, it is well-settled policy that the Commission does not scrutinize or regulate programming, nor does it take potential changes in programming formats into consideration in reviewing assignment applications. In 1976, the Commission issued a Policy Statement in which it concluded that review of program formats was not required by the Act, would not benefit the public, would deter innovation, and would impose substantial administrative burdens on the Commission.²⁰ The Supreme Court of the United States has upheld this policy and the Commission's determination that "the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters . . ." and that a change in programming is not a material factor that should be considered by the Commission in ruling on applications for license transfer.²¹ Notwithstanding these Commission policies, we emphasize that licensees are required to operate in accord with the terms of their authorization, and in the public interest.

Based on the above, we find that neither the Petitioners nor the Objectors have raised a substantial and material question of fact warranting further inquiry. We further find that Gateway is qualified to hold the Station's license and that grant of the Assignment Application is consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED, that The Committee to Save KFUFM's Petition to Deny the Assignment of License IS DENIED; the Radio Arts Foundation's Petition to Deny IS DENIED; the informal objections filed by the 54 informal objectors ARE DENIED, and the application for approval to assign the license for Station KFUFM, Clayton, Missouri (File No. BALH-20091026AAX), from The Lutheran Church- Missouri Synod to Gateway Creative Broadcasting, Inc. IS GRANTED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁰ See *Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 FCC 2d 858, 865-66 (1976), *recon. denied*, Memorandum Opinion and Order, 66 FCC 2d 78 (1977), *rev'd sub nom.*, *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979), *rev'd*, 450 U.S. 582 (1981).

²¹ *FCC v. WNCN Listener's Guild*, 450 U.S. 582, 585 (1981).