

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re Application of)
)
)
VANDERBILT STUDENT COMMUNICATIONS, INC.)
for renewal of license of)
WFCL (FM-Ed). Formerly: WRVU (FM-Ed))
)
)

File No. BRED-0120326AEY
Facility ID No. 69816

To: Chief, Media Bureau

PETITION TO DENY

WRVU FRIENDS & FAMILY

By: **Michael Couzens, Esq.**
Law Office of Michael Couzens
6536 Telegraph Ave., Suite B-201
Oakland, CA 94609
Phone: (510) 658-7654
Fax: (510) 654-6741

Alan Korn, Esq.
Law Office of Alan Korn
1840 Woolsey Avenue
Berkeley, CA 94703
Phone: (510) 548-7300
Fax: (510) 540-4821

Its Attorneys

June 30, 2012

TABLE OF CONTENTS

SUMMARY	1
I. <u>INTRODUCTION</u>	2
II. <u>WRVU FRIENDS & FAMILY HAS STANDING UNDER SECTION 309(D) OF THE COMMUNICATIONS ACT TO SUBMIT THIS PETITION TO DENY</u>	5
III. <u>LEGAL ANALYSIS</u>	6
A. THE APA AND THE MPA, BY RELINQUISHING STATION MANGEMENT AND COMMITTING TO AN OUTRIGHT SALE, CONTRADICTED EXPRESS LEGAL POWERS OF VSC AS SET FORTH IN ITS CHARTER AND BYLAWS, AND WAS <i>ULTRA VIRES</i>	6
B. BECAUSE OF SUDDEN AND ABRUPT CHANGES IN MAJORITY CONTROL WITHOUT COMMISSION APPROVAL, THE THEN SITTING BOARD LACKED VALID LEGAL AUTHORITY TO ENTER INTO THE APA OR THE MPA	8
C. THE INVALIDITY OF THESE BOARD ACTIONS WAS COMPOUNDED BY THE FAILURE TO TIMELY AND ACCURATELY REPORT OTHER CHANGES IN MAJORITY CONTROL TO THE FCC, ITSELF A SERIOUS RULE INFRACTION	12
D. THE COMMISSION MUST ANALYZE THE APA AND MPA TOGETHER AND FIND THAT \$450,000 WAS CONVEYED TO LICENSEE IN CONSIDERATION FOR THE SALE OF AIR TIME, IN VIOLATION OF SECTION 73.503(C) OF THE RULES	15
E. THE MPA CONSTITUTES A TOTAL RELINQUISHMENT OF CONTROL BY THE LICENSEE. AS SUCH IT REPRESENTS AN UNAPPROVED TRANSFER OF CONTROL IN VIOLATION OF SEC. 310(d) OF THE ACT AND RELATED COMMISSION RULES AND POLICIE	18
F. THE COMMISSION IS UNABLE TO FIND THAT THE STATION SERVED THE PUBLIC INTEREST DURING THE PREVIOUS LICENSE TERM. BECAUSE PAST PERFORMANCE IS NO PREDICTOR OF FUTURE PERFORMANCE WHERE THE INCUMBENT HAS RELINQUISHED ALL CONTROL AND IS CONTRACTUALLY OBLIGATED TO SELL TO ANOTHER ENTITY	22
G. THE BUYER, NASHVILLE PUBLIC RADIO, JOINTLY WITH VSC. HAS VIOLATED COMMISSION RULES BY ENTERING INTO AN MPA THAT ASSUMES FULL CONTROL OF THE STATION, AND VIOLATES POLICIES APPLICABLE TO SUCH AGREEMENTS	23
H. PROCEDURAL SETTING	24
IV. <u>CONCLUSION</u>	27

SUMMARY

WRVU Friends & Family petitions to deny the application for renewal of WRVU submitted by Vanderbilt Student Communications, Inc. The licensee has entered into a conditional sales contract and a time brokerage with a local National Public Radio member station. The contract has not been finalized because the buyer has not yet raised all the money. Petitioner's contentions center on this transaction, which at this time makes it impossible for the Commission to make the requisite public interest findings to grant a renewal.

The licensee's corporate charter gives its board of directors express powers to support and grow student media, including WRVU. The lease of time and attempted sale are beyond the charter and were *ultra vires*. The board as then constituted lacked authority to enter into the transaction, because it had gone through several changes of control, not reported to the Commission, let alone approved. The transaction itself, in word and intent, was unlawful, under established and new rules and policies. By vesting all program, financial, personnel and operational control in the manager, it constituted a prohibited transfer without Commission approval. The management agreement and the asset purchase, taken together, also appear to have been designed to mask substantial cash payments to the licensee in exchange for 18 months use of total air time.

Viewing the conduct of the licensee over the current term, and giving special weight to more recent conduct, all the misdeeds associated with the transfer of management and the attempted sale make a positive renewal finding impossible. As a predictor of future performance, nothing positive may be concluded from the licensee's stewardship, because it has no say in the station now. Nor will the licensee be involved going forward (except as the recipient of \$3.35 million) if an assignment is completed.

The Commission is requested to designate for hearing on the basic qualification issues raised. Alternatively, the Commission should defer action until the pending purchase agreement is withdrawn, or until a formal application for assignment is made, with the opportunity for public participation.

I. INTRODUCTION

WRVU Friends & Family (Petitioner) respectfully submits a petition to deny the renewal of license WFCL (FM-Ed), Nashville, Tennessee. The station is known widely under the call sign it chose to replace on June 1, 2011, and that will be used in this Petition: WRVU (FM-Ed). The aural licenses in the State of Tennessee expire on August 1, 2012, and the licensee, Vanderbilt Student Communications, Inc. (VSC) timely submitted its application for renewal on March 26, 2012. This petition is submitted pursuant to Section 309(d) of the Communications Act, 47 U.S.C. Sec. 309(d) and Section 73.3584 of the Commission's Rulers and Regulations, 47 C.F.R. Sec. 73.3594 and is timely.

A. The Station at Issue. WRVU (FM) is a noncommercial educational broadcast station operated by Vanderbilt Student Communications, Inc. (“VSC”). VSC was incorporated on September 22, 1967 with the stated purpose of operating, publishing and disseminating media of student communications at Vanderbilt University, including operation of radio station WRVU.¹ Notwithstanding the express mission set forth in its charter, the licensee on or about June 7, 2011, entered into an Asset Purchase Agreement (the “Purchase Agreement” or “APA”) with Nashville Public Radio (“WPLN”).² Under the Purchase Agreement, VSC agreed, subject to Commission approval, to assign its broadcast license and other tangible assets to WPLN for the purchase price of *\$3.35 million dollars* (\$3,350,000). WPLN agreed to pay VSC an initial cash deposit of \$300,000 and a subsequent cash deposit of \$150,000 by June 7, 2012 (Par. 2). On June 7, 2011, VSC and WPLN also entered also into a Management and Programming Agreement (“MPA”) and station management, programming, operation and financing have been carried out entirely by WPLN since

-
1. See Declaration of Joseph Helm (“Helm Decl.”) at Exh. A (VSC Charter of Incorporation).
 2. The logical acronym for Nashville Public Radio, “NPR,” easily confuses it with a national organization of that name from which it receives most of its programming. For that reason, the entity commonly refers to itself by the call sign of its flagship station, WPLN, and we adopt that practice in this filing. As the context requires, we shall also refer to the entity as the “Manager” and as the “Buyer” of WRVU (“the Station”).

that date. As is customary with local management agreements generally, this instrument reserves vestigial oversight by VSC, *pro forma*.

B. Reasons to Deny Renewal. As basis for denying the renewal of license for WRVU (FM), petitioner alleges the following:

1. The APA and the MPA, by relinquishing station management and committing to an outright sale, contradicted express legal powers of VSC as set forth in its by laws, and was *ultra vires*.
2. As the result of a sudden changes in the board of directors of VSC, the then sitting board lacked valid legal authority to enter into the APA or the MPA.
3. The invalidity of these board actions was compounded by the failure to timely and accurately report the change in control to the FCC, itself a serious violation of the Communications Act and of Commission Rules.
4. Terms of the MPA are inconsistent with long-standing Commission policies, and contravene the guidelines, and are subject to the sanctions set forth with respect to noncommercial, educational licensee KUSF and Classical Public Radio Network, LLC (*In Re: University of San Francisco*, DA 12-725 (Consent Decree & Order, June 7, 2012) (“*In Re USF*”))
5. The Commission is unable to find that the station served the public interest during the previous license term, because past performance is no predictor of future performance where the incumbent has relinquished all control and is contractually obligated to sell to another entity.
6. Just as with the recent KUSF consent decree. the Buyer and manager here, Nashville Public Radio, jointly with VSC violated Commission rules and policies by entering into the transaction and assuming full control of the Station.

C. **The Larger Public Policy Dimension.** While the financial support of educational and public radio has never been robust, this transaction comes at a juncture where university and other non-profit licensees are under some of the worst financial strains ever seen. These pressures are understandable, but the present danger is that licensees will be tempted to take short-term actions that may damage or destroy the avowed service for which they were entrusted with licenses. The renewal of an educational license calls upon the Commission to make the finding that such renewal will serve the public interest, at least for the future license term. In commercial broadcasting it is well established that the free play of market forces will result in ownership and program choices that serve the public more efficiently than any governmental mandate. In educational broadcasting, however, the class of potential owners is sharply restricted and specific rules govern the ability of third parties to profit from the service. Educational organizations willing to become licensees under these rules are accorded many privileges, including reduced competition for licensing, tax exemption, and government and non-government grants. Petitioner submits that contracts like the WPLN arrangements here cannot be reconciled with the Commission's core goals for noncommercial broadcasting, because they shed the educational licensee of any duties to carry forward an educational mission. So long as this transaction is in place, the Commission will be unable to make its public interest finding on the renewal application.

From the minute it became public the attempted sale of the station and broadcast license to Nashville Public Radio generated intense criticism among students, listeners, members of the Nashville community and supporters of college radio around the country. See e.g., S. Haruch, *A Year After The WRVU Sale, The License Transfer Still Isn't Complete — And The FCC Could Still Intervene*, Nashville Scene (June 7, 2012) (“*Nashville Scene*”);³ J. Waits, *Sad Final Moments of WRVU's Terrestrial Broadcast Recounted as Supporters Fight Proposed College Radio Station*

3. Located at <http://www.nashvillescene.com/nashville/a-year-after-the-wrvu-sale-the-license-transfer-still-isnt-complete-andmdash-and-the-fcc-could-be-poised-to-intervene/Content?oid=2890560>. A copy of this article is attached to the Declaration of Alan Korn (“Korn Decl.”) at Exh. G.

Sale, Radio Survivor (June 16, 2011);⁴ D. Troop, Vanderbilt Radio Fans Vow to Fight Sale of Their Station, *The Chronicle of Higher Education* (June 19, 2011).⁵ VSC's attempted sale also has received national (and international) attention, including a New York Times Op Ed piece about the sale of WRVU and the Nashville community's loss of unique, local public affairs programming, see F. O'Connell, "The Day The Music Died," *New York Times*, Opinion Section (June 11, 2011) ("At a time when local news was disappearing, we provided lengthy interviews with city politicians, Congressional representatives and authors.").⁶ Public antipathy towards the pending sale of WRVU to WPLN stems precisely from VSC's abdication of its responsibility to serve the public interest as an NCE licensee while simultaneously profiting from the sale of this scarce public resource.

II. WRVU FRIENDS & FAMILY HAS STANDING UNDER SECTION 309(D) OF THE COMMUNICATIONS ACT TO SUBMIT THIS PETITION TO DENY

WRVU Friends & Family is a Nashville-based 501(c)(3) non-profit organization whose membership is comprised of past and present WRVU DJs and listeners, Vanderbilt University students, faculty and staff, members of the Nashville community and supporters of college radio everywhere who are committed to supporting Vanderbilt student radio broadcasting. WRVU Friends & Family operates the website www.vivawrvu.org, a Save WRVU Facebook page (with 6,400 fans) located at <http://www.facebook.com/pages/Save-WRVU/155963281089773> and another Facebook page ("Viva WRVU") located at <https://www.facebook.com/profile.php?id=100002648066294>

Attached hereto is the Declaration of WRVU Friends & Family Board Member Ron Slomowicz. In his Declaration, Mr. Slomowicz attests that he and other members of Petitioner

-
4. Located at <http://www.radiosurvivor.com/2011/06/16/sad-final-moments-of-wrvus-terrestrial-broadcast-recounted-as-supporters-fight-proposed-college-radio-station-sale/>
 5. Located at <http://chronicle.com/article/Vanderbilt-Radio-Fans-Vow-to/127946/>. A copy of this article is attached to the Korn Decl. as Exh. E.
 6. Located at <http://www.nytimes.com/2011/06/12/opinion/12oconnell.html>. A copy of this New York Times OpEd article is attached to the Korn Decl. as Exh. F.

reside within the service area of WRVU. He also attests to the harm incurred by WRVU Friends & Family and its members arising from sudden unapproved changes to VSC's Board majority, VSC's abandonment of its corporation mission, and VSC's *de facto* delegation of control over WRVU to Nashville Public Radio. For these reasons, Petitioner has standing to file this Petition, 47 U.S.C. Section 309(d); *Office of Communication of the United Church of Christ v FCC*, 359 F.2d 994 (D.C. Cir. 1966) ("*UCC v. FCC*")

III. LEGAL ANALYSIS

A. THE APA AND THE MPA, BY RELINQUISHING STATION MANGEMENT AND COMMITTING TO AN OUTRIGHT SALE, CONTRADICTED EXPRESS LEGAL POWERS OF VSC AS SET FORTH IN ITS CHARTER AND BYLAWS, AND WAS *ULTRA VIRES*.

The VSC Charter of Incorporation, adopted on September 20, 1967, sets forth one, and only one purpose of the organization:

for the purpose of the operation, publication and dissemination of student communication media at Vanderbilt University, including but not limited to. the *Vanderbilt Hustler*, *The Commodore*, *Spectrum*, *Prometheus*, *The Dirty We'Jun*, *Masquerader*, and radio station WRVU.

Helm Decl., Exh. A-1. Under the Tennessee law of corporations and associations. "(a) Every corporation incorporated under chapters 11-27 of this title has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the charter." 2010 Tennessee Code Title 48 - Corporations And Associations Chapter 13 - Purposes and Powers 48-13-101. The general powers of this corporation do not contain any generic "things necessary and proper" clause. but further limit the organization, because they do not authorize the piecemeal sale of assets. Rather, the only stated authority to sell or give away assets is in conjunction with the dissolution of the entity.⁷

7. "The members may, at any time, voluntarily dissolve the corporation by a conveyance of its assets and property to the State of Tennessee, any County or Municipality of the State, or to any other corporation holding a charter from the State for purposes not of individual profit, first providing for corporate debts; provided that assets and any property so conveyed shall be used by the grantee for purposes similar to those of the conveying corporation." Helm Decl., Exh. A-2.

VSC's Bylaws Appendix approved 4/10/2002 states this as to the Corporate Mission:

Critical to all facets of the VSC mission is, above all, the preservation of a core set of student media outlets that provide the most expansive opportunities for students, the most significant and enduring sources of revenue, and the most recognized mediums of outreach and appeal to the University's local, regional, and national audience.

Id. at Exh. B-8, Section 1(b). The bylaws further provide:

VSC bears a directed responsibility to the students and community of Vanderbilt to provide for the preservation and improvement of these mediums of student mediums above all.

Id. at Par. 2, Section 1(d)).

For more than forty years, VSC adhered to this charter. However, in approximately June 2011 the Board's voted to sell the broadcast license for WRVU (FM) to WPLN for \$3.35 million dollars.⁸ Under this deal, VSC also agreed to hand over day-to-day operations of the facility to WPLN on a 24 hours a day, seven days a week basis, while the Buyer seeks to raise the purchase price. It is difficult to imagine any action of the Board more antithetical to its stated charge, and less possible to square with the limits on its express authority, than an outright sale or lease of WRVU to an entity having no interest in or involvement with student or campus life. *See also* Helm Declaration at Exh. B-8, Par. 2 at Section 1-C (VSC Bylaws) ("A variety of media exist on college and university campuses whose preservation is necessary and proper for the constituency of an elite institution with aspirations towards broad national aims. The delivery systems for these media include . . . radio"). Because the VSC Board lacked authority to assign the NCE license

This clause also would appear to restrict even a wholesale conveyance, upon dissolution, to a grantee providing student media services.

8. VSC's pending Purchase Agreement with WPLN is yet another transaction in what is quickly evolving into a national trend towards the consolidation and commercialization of public radio outlets. Recent deals seeking to purchase and transform flagship college radio stations into mainstream classical and jazz outlets include the sale of Rice University's KTRU FM in Houston, the sale of WDUQ FM originating from Duquesne University in Pittsburgh, and the sale of University of San Francisco's award winning KUSF FM to owners of the formerly commercial KDFC. Each of these transactions involve broker/buyer Public Radio Capital, whose Managing Directors Susan Harmon and Marc Hand have equated NCE licenses to "beachfront property" and asserted that "every College Station in the country is at risk."

under its corporate charter and bylaws, the actions were *ultra vires* and raise substantial questions as to the licensee's fitness and require a hearing into whether renewal of the license is in the public interest.

B. BECAUSE OF SUDDEN AND ABRUPT CHANGES IN MAJORITY CONTROL WITHOUT COMMISSION APPROVAL, THE THEN SITTING BOARD LACKED VALID LEGAL AUTHORITY TO ENTER INTO THE APA OR THE MPA

Section 310(d) of the Act states as follows:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.⁹

Normally, a change of fifty per cent (50%) or more of the board of directors or other governing body is treated as a transfer of control, necessitating a "long form" application and plenary review of the acquiring control group. In noncommercial broadcasting, the Commission has recognized that turnover may occur gradually over time, through normal rotation, term limits, and vacancies for whatever reason. *See Transfers of Control of Certain Licensed Non-Stock Entities*, 4 FCC Rcd 3403 (1989) ("Non-Stock Transfer NOI").¹⁰ Gradual changes in the governing boards generally need to be reported only where appropriate on the licensee's ownership report. *Id.*, Par. 29.

However changes to Board membership that are "substantial" (i.e., a change in the majority of the board) and "abrupt" (i.e., multiple seats and the effective majority changing in less than one (1) year) must be reported to the Commission using Form 315 ("Long Form") to determine whether there has been a change in an organization's purpose or mission suggesting a transfer of licensee control, or an exercise of control raising new qualification questions. In contrast, Form 316 (Short

9. 47 U.S.C. § 310(d).

10. The Non-Stock Transfer NOI described a membership organization as an entity in which a body of members elects a board of directors, which in turn exercises policy making authority in accordance with the entity's written organizational document. Examples of "membership" include contributors to a non-profit organization who are entitled to vote for the organization's board of directors, or individuals who belong to an association or union, or the congregation of a church. Non-Stock Transfer NOI ¶11.

Form) must be filed where transfer of board control is insubstantial or gradual.¹¹ Licensees submitting Form 315 are also obligated to make broadcast announcements concerning their filing of the application, and the Commission entertains Petitions to Deny the application for a 30-day period following issuance of a Public Notice. *See* Sections 73.3580 and 73.3584. Filers on Form 316 are required to certify that they have determined that use of the “short form” is appropriate.

The facts here show that during the current license term VSC has undergone substantial and abrupt changes to the Board’s voting majority on multiple occasions. Petitioner contends that in the absence even of reporting, let alone Commission approval, these changes denied the entity any legal authority to sell off its license. For the same reason the current illegitimate board lacks the authority to monetize its airtime by leasing all of its air for consideration, an “expense reimbursement” and for one-time payments of \$450,000 loosely characterized as down payments on the sale. *See infra* at pp. 17-18 and Korn Decl., Exhs. G and H.

According to the VSC Bylaws approved April 10, 2002, as amended,¹² the Board of Directors is to be comprised of the following individuals:

“Board members with voting privileges shall include three members of the University faculty and five student representatives. Non-voting members shall include a representative of the University’s Office of the Dean of Students, and the Director of Student Media. The officers of the Corporation shall be the Chair, the Vice Chair, the Secretary and the Director of Student Media.

11. Section 309(b) of the Act provides that prior to the grant of any application for the assignment or transfer of a license, the Commission must issue a public notice followed by a 30-day waiting period in which, pursuant to Section 309(d) any “party in interest” may file a petition to deny the application. Alternatively, Section 309(c) of the Act provides that certain types of applications, *e.g.*, transfers not involving a “substantial change” in control, are exempted from those procedures identified in Section 309(b). Under Commission regulations, applications for a transfer of control subject to the notice and 30-day waiting period of Section 309(b) are filed on FCC Form 315 (“Long Form”) whereas transfer applications falling within one of the exceptions listed in Section 309(c) are filed on FCC Form 316 (“Short Form”). *See* 47 C.F.R. Section 73.3540. [A different long form (No. 314) is provided for assignments to independent entities.]

12. *See* Helm Decl., Exh. B.

(Emphasis added). In addition, Section 1(b)(2) of the Bylaws provides that “Student Representatives shall be appointed by the Board each year, in alternating years, for two-year terms.” As described above, VSC was required to submit the Form 315 “Long Form” and identify outgoing and incoming board members whenever there was a change in the Board majority within a (1) year period. *See e.g., Instructions for Form 315, Section 3(E)* (Identifying parties to the application for entities that are not individuals, partnerships, corporations or LLCs as “[e]ach executive officer, member of the governing board and owner or holder of 5% or more of the votes in the applicant.”). *See also* Form 315 application, Section II, Question 4 (requesting information as to “[c]hanges in [transferor] interest as a result of transfer”) and Section IV, Question 6(a) (asking for “parties to the application” with respect to transferee)

Here, between the relevant period between August 2010 and March, 2012 when VSC authorized the MPA and Purchase Agreement, the Board of Directors underwent majority changes that should have triggered the filing of Form 315. Instead, these were reported episodically as though they were gradual. These changes are summarized as follows:

1. **Change in VSC Board between March 2, 2010 and August 26, 2010** (new board members identified in *italics*)

VSC Form 323-E– March 2, 2010

1. Kevin Leander (Chair) (12.5% Interest)
2. Vanessa Beasley (12.5% Interest)
3. Mark Wollaeger (12.5% Interest)
4. Sydney Wilmer (12.5% Interest)
5. Brendan Alviani (12.5% Interest)
6. Phil Carroll (12.5% Interest)
7. Allie Diffendal (12.5% Interest)
8. Courtney Kissack (12.5% Interest)
9. Justin Tardiff (Proxy) (12.5% Interest)
10. Chris Carroll (Exec. Director) (0% Interest)

VSC Form 316 – August 25, 2010

VSC Form 323-E – September 22, 2010

1. Mark Wollaeger
2. *Marc Hetherington*
3. *Kyle Blaine*
4. *Laura Dolbow*
5. *Laura Carpenter*
6. Phillip Carroll, IV
7. Courtney Kissack
8. *Thomas Shattuck*
9. Justin Tardiff

11. Paige Clancy (Secretary) (0% Interest)

12. Steve Caldwell (Ex Officio) (0% Interest)

Here, the Form 316 (Short Form) and Form 323-E Ownership Reports filed with the Commission reveal a majority of five (5) new voting board members (comprising a 55.5% majority) appointed to the VSC Board commencing in or about August 2010. Only four (4) out of nine (9) Directors (Mark Wollaeger, Phillip Carroll, Courtney Kissack and Justin Tardiff) continued on the VSC Board between March 2010 and August/September 2010. In addition to violating VSC Bylaws requiring that students be appointed for two-year terms, the licensee violated Rule 309(b) and Section 73.3540 by neglecting to file Form 315 and failing to obtain Commission approval as to this sudden shift in the Board's majority.

2. Change in VSC Board between September 22, 2010 and July 14, 2011 (new board members identified in *italics*)

VSC Form 316 – August 25, 2010

VSC Form 316 (Short Form) – Aug. 22, 2011

VSC Form 323-E – September 22, 2010

VSC Form 323-E November 14, 2011

1. Mark Wollaeger

1. Mark Wollaeger

2. Marc Hetherington

2. Marc Hetherington

3. Kyle Blaine

3. Kyle Blaine

4. Laura Dolbow

4. Laura Dolbow

5. Laura Carpenter

5. *Frederick Dreves*

6. Phillip Carroll, IV

6. *Meghan Rose*

7. Courtney Kissack

7. *Meryem Dede*

8. Thomas Shattuck

8. *Vanessa Beasley*

9. Justin Tardiff

The Form 316 (Short Form) and Form 323-E Ownership Reports filed with the Commission here reveal four (4) out of eight (8) new voting board members (i.e., 50%) appointed to the VSC Board for the first time in or about August 2011. Four (4) other members (Mark Wollaeger, Marc Hetherington, Kyle Blaine and Laura Dolbow) continued on the VSC Board between September 2010 and August 2011. This sudden fifty percent (50%) shift in voting rights reflected a change in control to the extent that these new board members could deadlock and thereby obstruct any Board

decision. This shift in Board control again necessitated the filing of Form 315 (Long Form) in accordance with Section 309(b) and Section 73.3540. Soon thereafter the reconstituted board voted to sell the Station and relinquish all air time.

C. THE INVALIDITY OF THESE BOARD ACTIONS WAS COMPOUNDED BY THE FAILURE TO TIMELY AND ACCURATELY REPORT OTHER CHANGES IN MAJORITY CONTROL TO THE FCC, ITSELF A SERIOUS RULE INFRACTION.

The reporting failures identified above had been long standing. VSC's latest renewal was granted on September 7, 2004. Since that date, there have been repeated unauthorized or unreported transfers of control of the entity. A summary of major changes to the VSC Board of Directors between August 27, 2004 and March 26, 2012 is attached hereto as *Attachment A*. This summary is based on information submitted by VSC in the following documents:

1. Corporate Annual Reports filed by VSC with the Tennessee Secretary of State between August 27, 2004 and September 2, 2010 (Helm Decl., Exh. C);
2. Form 323-E Ownership Reports filed by VSC with the Commission between April 1, 2004 and March 26, 2012 (Korn Decl., Exh. C); and
3. Form 316 (Short Form) Ownership Reports filed by VSC with the Commission on or about August 25, 2010 and August 22, 2011 (Korn Decl., Exh. D).

1. Unreported Change in Board Majority between August 2004 and August 2005

In its August 27, 2004 Corporate Annual Report filed with the Tennessee Secretary of State, VSC identified thirteen (13) board members. eight (8) of them individuals identified as "voting members." As noted in Attachment A and accompanying exhibits, the Corporate Annual Reports VSC submitted with the Tennessee Secretary of State one year later (August 24, 2005) identifies five (5) new voting board members (Bruce Barry, Anne Malinee, Mike Burns, Christina England and David Fotouhi) comprising a 62.5% voting majority. Only three (3) voting board members (Brad Vivian, Andy Dozier and Gosha Khuchua) remained one year later. Moreover, only one (1)

non-voting¹³ “ex officio” board member (Chris Carroll) out of the five (5) previously identified in the 2004 filing reappears in VSC’s August 2005 Corporate Report.

Among other things, this abrupt change in Board control violated VSC Bylaws providing for student representatives to be appointed for two-year terms. Moreover, this 62.5% change in voting board membership (and approximately 70% transfer of *total* membership) reflects a sudden change in the Board majority that again triggered the filing of Form 315 (Long Form). No such form was ever submitted by the licensee. Significantly, VSC was aware of Commission requirements under Section 309(b) and Section 73.3540 given its prior filing of a Form 315 on February 24, 2004 in connection with a previous “roll-over” of the Board of Directors membership.

2. Unreported Change in Board Majority Between August 2005 and September 2006

VSC’s Corporate Annual Report filed on September 25, 2006 identifies four (4) out of eight (8) new voting board members (50%) appearing for the first time in VSC’s September 2006 Corporate Annual Report (Stefanie Lindquist, Michael Ward, Rhyse Nance, Ally Smith). Four (4) out of eight (8) voting board members (Brad Vivian, Bruce Barry, Christina England and David Fotouhi) remained on the VSC Board one year after the August 2005 report was filed. Even factoring in the one non-voting member who remained on the Board the following year (Chris Carroll, Director of Student Media) and the new non-voting Secretary member (Paige Clancy),¹⁴ this September 2006 report still reflects a 50% change in overall membership. This sudden fifty percent (50%) shift in the board membership again reflected a shift in “negative control” based on the ability of new voting members to effectively block any Board action. Despite this, VSC failed to seek or obtain approval from the Commission concerning this major and sudden change in control by filing a Form 315 *or* Form 316. As noted above, this change also violated VSC’s Bylaws which require students to be appointed for two-year terms.

13. VSC’s bylaws provide that the Director of Student Media shall be a non-voting member of the Board of Directors. *See* VSC Bylaws, Exh. A, Section 23(g).

14. Form 323-E Ownership Report which VSC filed on March 21, 2006 identifies Chris Carroll and Paige Clancy as each retaining 0% voting interest. *See* Korn Decl., Exh. C. Paige Clancy is omitted from VSC’s Corporate Annual Report dated September 25, 2006.

3. Unreported Change in Board Majority Between March 2008 and August 2008

Assuming VSC's August 28, 2007 Corporate Annual Report is consistent with its Form 323-E filed with the Commission in March 2007,¹⁵ it would appear that four (4) out of eight (8) voting members were newly appointed to the VSC Board between August 2007 and August 2008 (Vanessa Beasley, Courtney Rogers, Sydney Wilmer and Claire Constantino). This sudden fifty percent (50%) shift in the board membership again reflects the new members' "negative control" over decisions based on their ability to create deadlock with respect to any Board decision. Again, VSC was again obligated to submit a new Form 315 (Long Form) to the Commission to document this sudden and abrupt change to the Board's composition. No such form was filed. In addition, VSC failed to file a Form 316 (Short Form) in connection with this substantial change in Board membership

Petitioner concedes that failure to file Form 315 on one occasion could arguably be construed as mere oversight. VSC's routine and continued failures to seek or obtain Commission approval raises a fact issue regarding the applicant's truthfulness and character. This is particularly so where there was continuity from 2004 through 2012 as to supervision of the station by the Director of Student Communications (Chris Carroll), charged with coordinating the activities of attorneys, engineers and other in connection with station operations. *See* VSC Bylaws, Article 2. Section 1(b) and Exh. A, Par. 23, Section 1. Rather, VSC's repeated failures to comply with Commission rules suggests these were willful and deliberate acts that raise questions as to the licensee's fitness and ability to operate in the public interest.

15. See Attachment A at footnote 1. The Corporate Annual Report filed with the Tennessee Secretary of State on August 28, 2007 contains an apparent scanning error that omits page 2 identifying certain Board Member. Petitioner on information and belief asserts those members are identical to the board members subsequently identified in VSC's Form 323-E Ownership Report dated March 3, 2008. Petitioner is attempting to obtain the missing page(s) from the Tennessee Secretary of State, and hopes to supplement this Petition once those documents are made available.

D. THE COMMISSION MUST ANALYZE THE APA AND MPA TOGETHER AND FIND THAT \$450,000 WAS CONVEYED TO LICENSEE IN CONSIDERATION FOR THE SALE OF AIR TIME, IN VIOLATION OF SECTION 73.503(C) OF THE RULES.

Under Commission policy, a conditional sales agreement is treated as an option, not requiring an assignment application until the conditions are met. Here the APA was disclosed, as required, Ownership Report BOA-20120326AEX, and submitted. Normally management agreements are not reviewed for Commission acceptance as they come into being, and here the MPA was disclosed and submitted also, *Id.* Even though no contract has been finalized, nor any assignment application submitted, these documents must be reviewed for their high relevancy to basic qualification of this licensee at renewal.

On June 7, 2012, the Commission issued an Order in response to the Letter of Inquiry concerning the unauthorized Public Service Operating Agreement (“PSOA”) between USF and CPRN. See *In Re: University of San Francisco*, DA 12-725 (Consent Decree & Order, June 7, 2012) (“*In Re USF*”). Under that PSOA, USF had agreed to make the station’s facilities available for programming supplied by CPRN “for up to 24 hours a day, seven days per week” while USF’s proposed assignment of broadcast license was pending with the Commission. *Id.* at Par. 4. The Consent Decree noted the following key facts with respect to that transaction:

In consideration for making station airtime available to CPRN, the PSOA provided that CPRN will reimburse USF for any expenses incurred in connection with delivering and broadcasting CPRN programming, including the cost of broadband or other circuits used for delivery and reception of the programming, electrical power to the transmitter site, regulatory fees, insurance rider, and telephone expenses incurred at the transmitter site. Additionally, CPRN agreed to pay USF: (1) \$5,000 per month for the first 120 days during which the PSOA is in effect; and (2) \$7,000 per month for the remainder of the first year of the PSOA term. Documentation provided by USF shows that USF collected over \$38,000 in PSOA fees from CPRN, plus nearly \$10,000 in tower cost reimbursement, from January through July 2011. The PSOA fees were ended by an amendment to the PSOA after the Bureau sent its Letter of Inquiry to USF and CPRN.

Id. The Media Bureau concluded that the payments in excess of expenses violated 73.503(c) of the Rules, which prohibits the sale of station time for profit.¹⁶ Consequently it also held that USF's and CPRN's certifications that the PSOA complied with Commission's Rules and policies were untrue. In their Consent Decree, the parties stipulated to that effect and agreed to a "voluntary contribution" of \$50,000 jointly, based on this violation. *Id.* Pars. 11, 12.

Applying the ruling to this transaction, we must first consider the role here of the Management and Programming Agreement (MPA) between VSC and WPLN. Virtually all such contracts are entered into jointly with an asset purchase when the contract is merely executory, as a bridge to cover the time period while FCC approval is sought. The KUSF ruling carefully avoided any legal conclusion that such agreements violated FCC rules and regulations as a general proposition.¹⁷ But the present case all but demands such scrutiny.

16. 47 U.S.C. Section 73.503(c) states as follows:

(c) A noncommercial educational FM broadcast station may broadcast programs produced by, or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. The payment of line charges by another station network, or someone other than the licensee of a noncommercial educational FM broadcast station, or general contributions to the operating costs of a station, shall not be considered as being prohibited by this paragraph.

17. The ruling was accompanied by a Press Release from the head of the Media Bureau, reaffirming the position on Sec. 73.503(c), but steering clear of saying that the Bureau in the future would either condone or condemn this type of MPA device generally: "I do wish to note that the relevant rules only apply to payments for program time and do not limit the ability of NCE stations to enter into other types of contracts such as a sale agreement, an option to buy or sell a station, a right of first refusal to buy a station, etc. I would like to emphasize that if an NCE licensee or programmer is not certain about how the relevant rule might apply to a particular transaction, they should contact the Audio Division or the Video Division, as appropriate, to discuss it in advance." *See* Statement of Media Bureau Chief William T. Lake Regarding Adoption of Consent Decree With The University of San Francisco and Classical Public Radio Network LLC (June 7, 2012) (located at <http://www.fcc.gov/document/media-bureau-chief-statement-kusf-fm-consent-decree>).

Pro forma, the MPA here is limited to the reimbursement of Buyer's expenses (Itemized reimbursements in Schedule 1(c); *See* Korn Decl. at Exh. A-14). However, this reimbursement-only plan is impossible to de-couple from the Asset Purchase Agreement. The Purchase Agreement provides for an initial payment of \$300,000 to VSC at the signing and a second payment of \$150,000 to VSC one (1) year later. *See* Korn Decl., Exh. B-2, Par. 2(a). In the event of a breach or default by Buyer, Seller keeps these deposits as liquidated damages. *Id.*, Exh. B-14, Par. 19(d). In the event of a termination without fault by either Party, Seller must return the deposits, but only if Buyer requests it to do so. *Id.* at Par. 19(d)(i). While the contract is not entirely clear, it would appear that Seller may keep the deposits if, within the first 18 months, Buyer is unable to notify Seller that it has raised the purchase price and is ready to proceed with the FCC application for assignment. *Id.*, Exh. B-13 at Par. 19(a)(iv) (failure to provide such notice not subject to cure period). Most strikingly, and unlike the usual practice, interest on these deposits belongs to the *Seller*, not to the Buyer. *Id.*, Exh. B-2, Par. 2(b).

Quite evidently the parties adopted these stratagems to enable a purchase of airtime without saying so. In contrast to the facts as set out in the USF consent decree, it could be inferred that these parties *knew* they were skating around the restrictions of Section 73.503(c). The inference is even stronger given acknowledgements here that the Buyer did not have the purchase price, and would not have it within the self-imposed 18-month forfeiture window. Rob Gordon, station manager for Nashville Public Radio station WPLN-FM admitted as recently as June 2012 that any such sale between VSC and WPLN could take "two to three years," and that the parties were aware of this when they entered into the APA and MPA. According to Mr. Gordon:

[I]f all goes well, the campaign will probably take "two to three years" to raise the needed money. "*We knew that going in*," he adds, while admitting the process has been bumpy at times. "We've learned a lot about capital campaigns," he says with a gentle, self-deprecating laugh.

S. Haruch, *A Year After the WRVU Sale*, *supra*.¹⁸ (Emphasis added).

18. *See* Korn Decl., Exh. G-1.

In another recent interview broadcast by Nashville Public Radio station WPLN on June 9, 2012, Mr. Gordon further explained that no sale had occurred over the past year because

“WPLN can't just write a 3.3 million dollar check to purchase WRVU. The station's making a down-payment and planning a capital campaign to pay off the balance *in the next eighteen months.*”¹⁹ (emphasis added).

Both of these statements constitute admissions against interest, and are admissible in this license renewal proceeding under exceptions to the hearsay rule, Federal Rules of Evidence, Rule 804(b)(2).

The transaction illustrates the ease with which a ban on cash for air time may be circumvented by willing parties to an asset purchase, using skillful drafting. Brokerages are not permitted in low power FM,²⁰ and one lesson here might be that they should be outlawed in the future for all noncommercial, educational broadcast services. But in this case the substantial, albeit disguised, \$450,000 programming fees *do* constitute consideration and *do* establish a clear-cut rule violation, without any need to chart new Commission policy against non-commercial “LMA's.” A hearing is therefore required to determine whether VSC and WPLN intended this transaction, which they knew could not be satisfied under its terms, as an end-run around the express prohibition of Section 73.503(c).

E. THE MPA CONSTITUTES A TOTAL RELINQUISHMENT OF CONTROL BY THE LICENSEE. AS SUCH IT REPRESENTS AN UNAPPROVED TRANSFER OF CONTROL IN VIOLATION OF SEC. 310(d) OF THE ACT AND RELATED COMMISSION RULES AND POLICIES

Here the Management and Programming Agreement is not just a bridge for four to six months, while the FCC considers a purchase contract and an assignment application. Rather it is a transfer of comprehensive practical control, in spite of the contrary boilerplate. *See* APA, Par. 4(a)(vii) and Par. 14. *See* Korn Decl. at Exh. B-3 to B-4 and Exh. B-11. As stated in the MPA –

19. *See* Korn Decl., Exh. H-2.

20. No LPFM licensee may enter into an operating agreement of any type, including a time brokerage or management agreement, with either a full power broadcast station or another LPFM station,” Sec. 73.860(c).

- Manager's duties include programming, finances, personnel, administration, engineering, financial management, accounting, routine engineering, and legal and FCC compliance (Par. 1(a))
- Manager may terminate if in its good faith judgment the licensee unreasonably frustrates or impedes effective management and programming of the station (Par. 3(b)).
- Manager applies for grants, including from Corporation for Public Broadcasting. Licensee “approves” and Manager acts as fiscal agent (Para. 4(a)).
- Manager fundraises for the Station, and keeps the funds “sufficient” to operate the Station in consultation with Licensee (Par. 4(b)).
- Manager keeps financial and accounting records, subject to Licensee's rights to inspect on demand (Par. 12).
- Manager “is authorized to hold itself out as the manager and operator of the Station,” (Par. 13).
- Manager may enter into contracts in connection with operation of the Station in its own name; but the relationship is not one of joint venture or partnership. (Par. 13).

Section 310(d) of the Act provides in pertinent part:

No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

The arrangement summarized above is nothing less than a *de facto* grant by licensee of total control, without Commission approval.

The Commission is not required to take, at face value, a boiler plate avowal of continuing Licensee oversight (MPA. Par. 4(a)(vii) and Par. 14), when the precise legal mechanics of the instrument stand in bold contradiction. The Commission's practice is to look beyond the legal title

to whether a new entity or individual has obtained the right to determine the basic operating policies of the station in ascertaining. If so the Agency will hold that a transfer of control has indeed occurred. See *WHDH, Inc.*, 17 FCC 2d 856 (1969) *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970) *cert. denied*, 403 U.S. 923 (1971); *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir., 1968), *cert den.*, 383 U.S. 967.

Specifically, the Commission examines three essential areas of station operation: programming, personnel and finances. See, e.g., *Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), *recon. denied*, 50 RR 2d 1346 (1982). A licensee may delegate certain functions on a day-to-day basis to an agent or employee, but such delegation cannot be wholesale. See, e.g., *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981). But persons assigned a task must be guided by policies set by the permittee or licensee. See *David A. Davila*, 6 FCC Rcd 2897, 2899 (1991). Here we have no evidence that the Licensee and Seller continues to shape policy or practice in any way.

In the area of programming, the MPA includes an outlandish clause permitting the Manager to terminate if the Licensee unreasonably interference with management *or programming*. Par. 3(b). This is to be determined unilaterally by the Manager, in its “reasonable” “good faith judgment.”

In the area of personnel, the Manager is permitted (Par. 13) to hold itself out as the operator and manager of the Station, and may enter into contracts in its own name on behalf of the Station. Manager's duties include management and, of course, personnel. Par. 1(a)).

In the financial sphere, the Manager keeps the books, applies for and accepts grants, fundraises for whatever amount it deems “sufficient” to cover “expenses.” Pars. 1, 4, 12. Manager also acts as fiscal agent. Par. 4(a).

Petitioner submits that no adduction of fact is necessary beyond these clauses themselves for the Commission to hold that this is a transfer and total relinquishment of control. The standard for assessing control is not affected by the existence of an LMA or here, “MPA.” *Choctaw*

Broadcasting Corporation, 12 FCC Rcd 8534, 8538 (1997). And while a short-term LMA assisting an asset purchase might not constitute a rule violation, here the abdication is for an extended period of time while Buyer attempts to raise the purchase price. The most likely interpretation is that the initial 18-months period, with no cure, is intended to “forfeit” the down payments to the Seller, and then revive the sales transaction for additional time.

This operational provisions of the agreement are entirely like the one held to constitute an unauthorized transfer of control in *In Re K.I.D.S. - TV*, DA 00-1358 (EB, October 20, 2000).

“Under the agreement, Bear Valley has ‘full and complete power and exclusive authority’ to operate the station. Moreover, Bear Valley assumed all of the financial risks and the financial benefits from the operation of the station. All of the station’s employees are Bear Valley’s employees, and Bear Valley has the exclusive right to set personnel policies for the station.”

Id. Par. 9. In that case, the licensee had no role in setting policy because he was incarcerated. In this case, the Board of the Licensee are effectively walled off from participation by their written Management Agreement.

As noted more recently, the Commission has directed that,

Licensees engaged in [TBAs] . . . must operate . . . as a stand-alone entity discrete from the [TBA operator]. Thus, we require that licensees must maintain their own bank accounts, pay the salaries of their own employees, and remain responsible for their own obligations to programmers, utility companies, and other operational matters. In other words, the licensee should be ready and able to operate independently from the [TBA operator] at any time it believes the arrangement does not fulfill its public interest responsibilities.

Birach Broadcasting Co., DA 10-456, 25 FCC Rcd 2644, (EB, rel. on March 18, 2010.) Here, none of this is required to be done by the Licensee under the comprehensive delegations of its MPA and, upon our information and belief, none of this is being done here.

James A. Kay, Jr. v. FCC, 396 F.3d 1184 (D.C. Cir. 2005) involved the relinquishment of control of two-way mobile radio service. In it, the court of appeal confirmed the validity of a Commission control analysis based on *Intermountain Microwave*, 24 R.R. 983 (1963). Under that six-fold test, control was held to have transferred without authorization when the Manager (1) has unfettered access to the station; (2) controls daily operations and supplies all equipment and labor.

(3) carries out policy decisions and prepares and files applications at the Commission, and sets billing rates; (4) is in charge of personnel; (5) is in charge of the financing, including paying all the operating expenses; (6) receives the profits. While profits are not at issue in this, a broadcast case, the deferral of all program choice to another entity, for a noncommercial license, should be a major factor even beyond the scope of *Intermountain. Id.* It is striking in that case that the Court of Appeal, following and upholding the Commission's findings of fact, in most of the six areas relied exclusively on the wording of the agreement.

F. THE COMMISSION IS UNABLE TO FIND THAT THE STATION SERVED THE PUBLIC INTEREST DURING THE PREVIOUS LICENSE TERM, BECAUSE PAST PERFORMANCE IS NO PREDICTOR OF FUTURE PERFORMANCE WHERE THE INCUMBENT HAS RELINQUISHED ALL CONTROL AND IS CONTRACTUALLY OBLIGATED TO SELL TO ANOTHER ENTITY

Upon an application for renewal, the Commission is charged with making a public interest determination under Section 309(k)(1)(a). The statute by express terms calls for review of the entire past license term, and the public interest demands consideration of all relevant factors, *Gottfried v. FCC*, 655 F.2d 297 (D.C. Cir. 1981). Insofar as past performance comes under review, the Commission has said that more recent performance is to be accorded the most weight. See e.g. *United Broadcasting Co. Inc.*, 100 FCC 2d 1574, 1581 (1985); *Monroe Communications Corp. v. FCC*, 900 F.2d 351, 353 (D.C. Cir. 1990).

The Commission, performing its review of the favorable aspects to the record during the Licensee's term, has no performance to examine, certainly no recent performance because the airtime has been remitted wholesale to another entity. The Licensee has done nothing but receive its fees, and the diverse, local and student service components of the Station's mission have fallen away. The Commission, needing also to examine all relevant misconduct, including rule violations, must give special weight to the Management Agreement because it is relatively recent, and continuing. There is nothing before the Commission to enable a favorable prediction of Licensee's future performance. The fact that the Licensee's willful relinquishment of responsibility took place after improper and undisclosed transfers of Board control also weighs heavily against renewal here.

Nashville Public Radio (WPLN) is a National Public Radio Member Station with a license for flagship WPLN, (Facility ID 53821, 100 kilowatts), and three other stations in the Greater Nashville area.²¹ Legally, it is a tax-exempt non-profit, one whose qualifications have been reviewed by the Commission numerous times. Petitioner has no need to criticize the services provided by WPLN within its sphere. Our point is that an assignment application is not before the Commission, as VSC is not yet proposing to assign the Station to WPLN, or to anyone else. The qualifications of an assignee are a matter for public comment and Commission decision only when an application for assignment is made. Petitioner submits that the Commission should not grant renewal of a license here, where an executory contract of assignment is pending and the NCE renewal applicant's qualifications, record and intentions are irrelevant, under a binding contract, going into any renewal term.

This situation, which appears to be highly unusual if not unique, makes the public interest finding impossible. The Commission cannot predict future performance, based on past performance of the Licensee, because the licensee has abdicated any performance. Yet the Commission also cannot assume satisfactory future performance by an assignee that is not before it as a cognizable party to the renewal. Unless the assignment is consummated – or the contract terminated – the Commission must defer action on the renewal.

G. THE BUYER, NASHVILLE PUBLIC RADIO, JOINTLY WITH VSC, HAS VIOLATED COMMISSION RULES BY ENTERING INTO AN MPA THAT ASSUMES FULL CONTROL OF THE STATION, AND VIOLATES POLICIES APPLICABLE TO SUCH AGREEMENTS.

The University of San Francisco consent decree, *supra*, resulted in sanctions against the proposed assignor and assignee alike. To the degree that the foregoing discussion establishes that the MPA violates Commission rules and policies, the parties are at fault jointly. This point is not

21. WHRS, Cookeville; WPLN (AM), Madison; and WTML Tullahoma. The entity's background, mission and services are set forth in detail on its web site: <http://wpln.org/home.php>. It is of interest that Nashville Public Radio's stated mission does not specifically include education or educational services: "**Mission Statement:** Connecting our community through trusted information, inspiring music, and unique entertainment." *Id.*

relevant to the renewal application at issue here, but would be highly relevant if an assignment application were submitted in furtherance of the sales agreement, presenting the need for the Commission to pass anew on the basic qualifications of WPLN should it become a proposed licensee. This is an additional reason that the Commission cannot grant the renewal while the proposed assignment is still hovering over the Licensee. The Licensee cannot unilaterally abandon the proposed assignment, even if it wanted to, because the APA contains a specific performance clause, allowing Buyer to compel it to complete the deal once the consideration is assured. *See* Korn Decl., Exh B-12 to B-13 at Par. 18. The Licensee comes into its renewal period bereft of any legal power on its own to do anything but permit the Manager to continue to operate the Station from top to bottom, and permit the Manager-Buyer to acquire the Station for \$3.3 million.

IV. PROCEDURAL SETTING

The Telecommunications Act of 1996 (“Telecom Act”) modified the standards for renewal, as set forth in new 47 U.S.C. Section 309(k). The Commission “shall grant” the application for renewal “if it finds, with respect to that station, during the preceding term of its license –

(A) the station has served the public interest, convenience, and necessity;

(B) there have been no serious violations by the licensee of this Act or the rules and regulations of the Commission; and

(C) there have been no other violations by the licensee of this Act or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse [47 U.S.C. Section 309(k)(1)].

The 1996 Act amended the provisions governing petitions to deny, at 47 U.S.C Section 309(d)(1), to cross reference this renewal standard, but otherwise has left the form, substance, and burdens of proof for petitioners as they were in long-established practice. “Any party in interest may file with the Commission a petition to deny any application” for a broadcast license. “The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be containing specific allegations of fact sufficient

to show “that a grant of the application would be *prima facie* inconsistent with subsection (a) [public interest convenience, and necessity] (or subsection (k) in the case of renewal of any broadcast station license.” 47 U.S.C. Section 309(d)(1)

In an Order released on April 12, 1996, the Commission modified its rules to conform to the Statute. See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*. Order, 11 FCC Rcd 6363 (1996). Noting that the Telecom Act does not define the terms contained the renewal standards embodied in Section 309(k), the Commission likewise declined to do so. “It is our present intent to continue to apply existing policy statements and case law, refining these as appropriate on a case-by-case basis, in interpreting the statutory terms that govern the new renewal process. (Id. at 6363-4). In analyzing a petition to deny, Section 309(d) will be applicable as in the past, and the treatment of allegations continues to be in the manner set forth in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (“*Astroline*”):

The Commission must perform section 309(d)'s threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits. Moreover, in evaluating a request for an evidentiary hearing under Section 309(d)(1), the Commission must proceed ‘on the assumption that the specific facts set forth [in the petition] are true.’ *Citizens for Jazz on WRVR v. FCC*, 249 U.S. App. D.C. 342, 775 F.2d 392, 397 (D.C. Cir. 1985). As we elaborated in *Gencom, Inc. v. FCC*, 265 U.S. App. D.C. 403, 832 F.2d 171 (D.C. Cir. 1987): If the Commission determines that the petition satisfies the threshold standard, the inquiry proceeds to a second phase.

Petitioner submits that here it has presented facts sufficient to establish at least two “serious violations” within the meaning of Section 309(k)(1): First, a series of unauthorized, and in some instances undisclosed transfers of control of the Board of Directors of the entity; and second, an improper relinquishment of control, and prohibited “sale” of noncommercial broadcast time, through the concurrent Asset Purchase and MPA.

Even if these matters were not serious, these issues would depict a “pattern of abuse.” Section 309(k)(1)(C). The language is not defined, but may be seen to parallel the terms “willful” and “repeated” as they have been applied in forfeitures.²²

Once the Commission determines that a substantial and material question of fact has been raised as to the required finding under Section 309(k)(1), it must proceed to a penalty analysis under Section 309(k)(2). The Commission may designate the application for hearing and, based on the evidence adduced, deny the application for renewal if the standard for renewal has not been met and no mitigating factors justify the imposition of a lesser sanction. The Commission also may grant the application with accompanying sanctions, “including renewal for a term less than the maximum otherwise permitted.” This structure is not fundamentally different from the earlier practice, except in the three-prong definition of a renewal standard. If a substantial question of fact has been raised, or if the Commission cannot, for any reason, find that grant of the application would be consistent with the public interest standard, it must proceed to the penalty phase, or conduct a hearing looking to license denial in accordance with 47 U.S.C. Sec. 309(e), *Astroline, Id.* See 47 U.S.C. Sec. 309(d)(2).

In applying this statutory framework, the Commission is forbidden to consider whether the public interest might be better served by the grant of the license to “a person other than the renewal applicant. 47 U.S.C. Section 309(k)(4). That clause presents a difficult problem here because the

22. Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, inter alia, a cable television operator's repeated signal leakage). “Repeated” merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

licensee comes up for renewal while it has pending an executory contract for the outright sale of the Station to “a person other than the renewal applicant.” At this time no assignment application has been filed, and the qualifications of an assignee are not formally before the Commission. So the renewal applicant is but a zombie licensee that presumably will provide no public service in the renewal term, but will simply collect its bargained-for cash price. One possibility at the penalty stage would be for the Commission, using its power to apply “appropriate” conditions to the renewal, to defer action on the renewal until the APA is either withdrawn, or implemented with an assignment application, with public notice and a legal right of petition. That way the qualifications of an actual Licensee – one way or the other – would be up for consideration in the renewal, as they should be.

V. CONCLUSION

Petitioner WRVU Friends & Family respectfully requests that the Commission reject the applicant's renewal application. Because VSC has made no showing that it is a qualified licensee; because it has repeatedly violated the Commission’s reporting rules; because its *de facto* transfer of the frequency violates Commission rules and the licensee’s own corporate charter; and because this improper transfer substantially diminishes broadcast localism and diversity and lacks any educational component, renewal of the license is not in the public interest. Similarly, WPLN’s exercise of total control over station operations and its failure to comply with Commission rules under the MPA also demonstrates that VSC should not be the third-party beneficiary of a renewal to the incumbent where both its past and its future performance are, by definition, irrelevant..

For the above reasons, the Commission should designate the application for hearing on issues to determine whether renewal of VSC’s license is in the public interest.

///

///

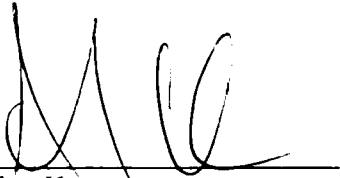
///

///

Respectfully submitted,

/Michael Couzens/

Michael Couzens, Esq.
Law Office of Michael Couzens
6536 Telegraph Ave., Suite B-201
Oakland, CA 94609
Phone: (510) 658-7654
Fax: (510) 654-6741

A handwritten signature in black ink, appearing to read 'AK', written over a horizontal line.

Alan Korn

Law Office of Alan Korn
1840 Woolsey Avenue
Berkeley, CA 94703
Phone: (510) 548-7300
Fax: (510) 540-4821

July 2, 2012

ATTACHMENT A

SUMMARY OF CHANGES TO WRVU BOARD FROM 2004 TO 2012

The following data summarizes changes to the Board of Directors of Vanderbilt Student Communications, Inc. between August 27, 2004 and March 26, 2012. This summary is based on information provided by VSC in the following documents:

* Corporate Annual Reports filed by VSC with the Tennessee Secretary of State between August 27, 2004 and September 2, 2010 (Declaration of Sharon Scott, Exh. ___);

* Form 323-E Ownership Reports filed by VSC with the Commission between April 1, 2004 and March 26, 2012 (Declaration of Alan Korn, Exh. C); and

* Form 316 (Short Form) Ownership Reports filed by VSC with the Commission on or about August 25, 2010 and August 22, 2011.

1. Majority Change in VSC Board Between August 2004 and August 2005 (new Board members identified in *italics*):

August 27, 2004 Annual Report

Voting Members

1. Brad Vivian (Faculty)
2. Tom McGinn (Faculty)
3. Andy Dozier (Faculty)
4. Danielle Throneberry
5. Tim Boyd
6. Jennifer Carlisle
7. Gosha Khuchua
8. Kristin Taylor

Ex Officio Members

9. Steve Caldwell
10. Sybril Bennett
11. Jennifer Peebles
12. Chris Carrol
13. Chad Wilcox

August 24, 2005 Annual Report

Board of Directors

1. Brad Vivian (Board Chair)
2. Andy Dozier (Board Vice Chari)
3. *Bruce Barry*
4. *Anne Malinee*
5. *Mike Burns*
6. Gosha Khuchua
7. *Christina England*
8. *David Fotouhi*
9. Chris Caroll (Dir. Student Media)
10. Paige Orr (Board Secretary)

2. **Majority Change in VSC Board Between August 2005 and September 25, 2006** (new Board members identified in *italics*)

August 24, 2005 Annual Report

September 25, 2006 Annual Report

Board of Directors

- | | |
|---|---|
| 1. Brad Vivian (Board Chair) | 1. Brad Vivian (Board Chair) |
| 2. Andy Dozier (Board Vice Chari) | 2. Bruce Barry (Board Vice Chair) |
| 3. Bruce Barry | 3. <i>Stefanie Lindquist</i> |
| 4. Anne Malinee | 4. <i>Michael Ward</i> |
| 5. Mike Burns | 5. <i>Rhyse Nance</i> |
| 6. Gosha Khuchua | 6. <i>Ally Smith</i> |
| 7. Christina England | 7. Christina England |
| 8. David Fotouhi | 8. David Fotouhi |
| 9. Chris Caroll (Director of Student Media) | 9. Chris Carroll (Director Student Media) |
| 10. Paige Orr (Board Secretary) | 10. <i>Paige Clancy</i> (Board Secretary) |

3. **Change in VSC Board between March 3, 2008 and August 7, 2008** (new Board members identified in *italics*)

March 2008 Form 323-E

August 7, 2008 Annual Report

- | | |
|--------------------------|--|
| 1. Bruce Barry | 1. Bruce Barry (Chair) |
| 2. Stefanie Lindquist | 2. Kevin Leander (Vice Chair) |
| 3. Kevin Leander | 3. Paige Clancy (Secretary) (Non-Voting) |
| 4. Alison Smith | 4. <i>Vanessa Beasley</i> |
| 5. Douglas Kurdziel | 5. Doug Kurdziel |
| 6. Katherine Miller | 6. Ally Smith |
| 7. Michael Warren | 7. <i>Courtney Rogers</i> |
| 8. Elizabeth Rhyse Nance | 8. <i>Sydney Wilmer</i> |
| 9. Chris Carroll | 9. <i>Claire Constantino</i> (Alt. Member) |
| 10. Paige Clancy | 10. Chris Carroll (Dir. Student Media)
(Non-Voting) |

4. **Change in VSC Board between March 2, 2010 and August 26, 2010** (new Board members identified in *italics*)

VSC Form 323-E– March 2, 2010

1. Kevin Leander (Chair) (12.5% Interest)
2. Vanessa Beasley (12.5% Interest)
3. Mark Wollaeger (12.5% Interest)
4. Sydney Wilmer (12.5% Interest)
5. Brendan Alviani (12.5% Interest)
6. Phil Carroll (12.5% Interest)
7. Allie Diffendal (12.5% Interest)
8. Courtney Kissack (12.5% Interest)
9. Justin Tardiff (Proxy)(12.5% Interest)
10. Chris Carroll (Exec. Director) (0% Interest)
11. Paige Clancy (Secretary) (0% Interest)
12. Steve Caldwell (Ex Officio) (0% Interest)

**VSC Form 316 – August 25, 2010
VSC Form 323-E – September 22, 2010**

1. Mark Wollaeger
2. *Marc Hetherington*
3. *Kyle Blaine*
4. *Laura Dolbow*
5. *Laura Carpenter*
6. Phillip Carroll, IV
7. Courtney Kissack
8. *Thomas Shattuck*
9. Justin Tardiff

5. **Change in VSC Board between September 23, 2010 and July 14, 2011** (new Board members identified in *italics*)

**VSC Form 316 – August 26, 2010
VSC Form 323-E – September 23, 2010**

1. Mark Wollaeger
2. Marc Hetherington
3. Kyle Blaine
4. Laura Dolbow
5. Laura Carpenter
6. Phillip Carroll, IV
7. Courtney Kissack
8. Thomas Shattuck
9. Justin Tardiff

**VSC Form 316 (Short Form) – July 14, 2011
VSC Form 323-E November 14, 2011**

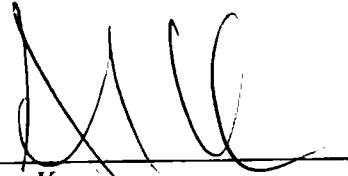
1. Mark Wollaeger
2. Marc Hetherington
3. Kyle Blaine
4. Laura Dolbow
5. *Frederick Dreves*
6. *Meghan Rose*
7. *Meryem Dede*
8. *Vanessa Beasley*

CERTIFICATE OF SERVICE

On July 2, 2012, the above PETITION TO DENY OF WRVU FRIENDS AND FAMILY was served by United States Mail, postage prepaid to the following addressees:

Law Offices of Donald E. Martin, P.C.
P.O. Box 8433
Falls Church, Virginia 22041

Irene Bleiweiss*	(Irene.Bleiweiss@fcc.gov)
James Bradshaw*	(James.Bradshaw@fcc.gov)
Edna Prado*	(Edna.Prado@fcc.gov)
Elizabeth Robinson*	(Elizabeth.Robinson@fcc.gov)
Peter Doyle*	(Peter.Doyle@fcc.gov)



Alan Korn

* courtesy copies provided to members of the Audio Division staff at the FCC via electronic mail only