Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
VANDERBILT STUDENT COMMUNICATIONS, INC.	)	File No. BRED-0120326AEY
for renewal of License of	)	
WFCL (FM-Ed), formerly:WRVU (FM)	)	Facility ID No. 69816
Nashville, Tennessee	)	

To: Chief, Media Bureau

REPLY TO OPPOSITION TO PETITION TO DENY

WRVU FRIENDS & FAMILY

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June 30, 2012

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SUMMARY OF THE REPLY

WRVU Friends and Family submitted a petition to deny the application for renewal of license of WFCL (FM-Ed), Nashville, Tennessee, submitted by Vanderbilt Student Communications, Inc. ("VSC"). The licensee submitted an Opposition ("Opp.") on August 8, 2012. This Reply addresses the contentions raised in Opposition.

Our petitioner entity includes listeners, programmers, volunteers and others interested in or involved with WFCL, and with its long-standing broadcast service since 1967 as a university station, well known by the former call sign WRVU. Although listener standing in renewal cases is well established in Commission and judicial precedent, the licensee disputes our standing, citing cases turning on other facts, or not even pertinent to mass media.

Petitioner's main contention is that the licensee abdicated its responsibilities for Commission compliance, for administration, and for operating in the public interest. The licensee entity changed hands without reporting the fact. It entered into a sale of the station more than a year ago, and while it disclosed the asset purchase agreement, it did not submit an assignment application until recently. Express terms of VSC's charter were directly contrary to its actions. Finally, it entered into a local management agreement with its buyer, ceding virtually all responsibility and pocketing $450,000 against the sale price -- a sizeable amount which it claims, unpersuasively, was not a time sale. The Opposition ranges far afield for case law that would lessen its responsibility for these actions, but the search ultimately does not exonerate. The recent University of San Francisco consent decree, specifically, does not confirm the validity of what was done here, but cautions against it.

The renewal applications should be designated for hearing on the issues discussed. In no event should a renewal be granted until the public record is complete on the station's pending application for assignment, and a decision made thereon.

INTRODUCTION

WRVU Friends and Family (F&F or Petitioner) on July 2, 2012 submitted a petition to deny the application for renewal of license of WFCL (FM-Ed), Nashville, Tennessee, filed by Vanderbilt Student Communications, Inc. The licensee submitted an Opposition on August 8, 2012. In this Reply we address the contentions raised in Opposition.[1]

Our petitioner entity includes listeners, programmers, volunteers and others interested in or involved with WFCL, and with its long-standing broadcast service since 1967 as a university station, well known by the former call sign WRVU. Although listener standing in renewal cases is well established in Commission and judicial precedent, the licensee disputes our standing, citing non-broadcast law or cases that turned on other issues.

Petitioner's main contention is that the licensee abdicated its responsibilities for Commission compliance, for administration, and for operating in the public interest. The entity changed hands without reporting the fact, so that its legal authority to convey the station was, at best, unclear. It entered into a sale of the station more than a year ago, and while it disclosed the purchase agreement, it did not submit an assignment application until recently. Express terms of VSC's charter were directly contrary to its actions. Finally, it entered into a local management agreement with its buyer, ceding virtually all responsibility and pocketing $450,000 against the sale price -- a sizable amount which VSC tries to claim was not a time sale. The approach of the Opposition is to quarrel with some of the factual and legal underpinnings of each one of these contentions. The Opposition strikingly fails to see the matter holistically, as a problem with the extra-legal relinquishment of station responsibility during the renewal term.

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1 Petitioner on August 7, 2012 submitted a Consent Motion for Extension of Time to file a reply, until today.

A. PETITIONER HAS STANDING

Petitioner is non-profit organization with membership comprised of past and present WRVU DJ's and listeners, Vanderbilt University students, faculty and staff, members of the Nashville community and supporters of college radio everywhere. Petitioner has standing to file this Petition as a group of interested local listeners alone, 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*").[2] The Opposition cites two cases where standing was denied, neither of which involved a claim of local listener standing, let alone direct involvement and interest. In one, standing was denied in an assignment-of-license case, to an out-of-state creditor and to a state court litigant having an unrelated dispute with the applicant.[3] The other case involved petitions to deny initial applications for Broadband C Personal Communications Service licenses, based on the alleged consequences for petitioner's limited partnership investment. The latter case does not involve renewals, nor listeners, nor even Title III broadcast services.[4]

From the latter case the Opposition argues that petitioner lacks standing because the redress it asks for – denial of the application for renewal – would not grant it any relief it wants or could use. This misjudges the remedy we seek. We ask that the renewal application be designated for hearing on specified issues. Depending on the facts adduced in the hearing the Commission has a wide range of remedies or sanctions available, including short term renewal, and the power to "grant the application on terms and conditions as are appropriate." 47 U.S.C. Section 309(k)(2). For that matter, a denial of renewal as one remedy, opening a scarce non-commercial channel for new applications,

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2 *United Church of Christ* remains good law today. A subsequent decision narrowed listener standing where the "listeners" were some few local residents by happenstance of a national membership organization, *Rainbow/PUSH Coalition v. FCC*, 300 F.3d 539 (D.C. Cir., 2003). The present case, with interested parties having strong connections with the Station and the community, is not in that category.

3 *Jerry Russell d/b/a the Russell Company*, DA 12-1198 (MB rel. July 27, 2012); Opp. fn. 2.

4 *In re PCS 2000, L.P.*, 12 FCC Rcd 1681; Opp. p. 4 and fn. 5.

indeed might serve the public interest and petitioner's goals better than a renewal here, with the non-university assignee waiting in the wings. We also note that the acceptance of the opposition argument, requiring a showing of direct personal injury in a broadcast license renewal case, would negate public participation in all such renewal cases.

B. THE ASSIGNMENT WAS AN ACTION BEYOND THE APPLICANT'S LEGAL AUTHORITY

The Opposition argues that the proposed renewal and the proposed assignment are separate and distinct issues, and that we should limit our discussion to the renewal, and to licensee's conduct during the renewal term. Nothing could be further from the truth. The Opp. notes that ". . . WPLN has initiated the assignment application process and that an assignment application will be filed shortly."[5] So we have a situation where the applicant entered into a binding asset purchase agreement with Nashville Public Radio ("WPLN"), as well as management agreement on June 7, 2011, but waited for more than a year and until after the renewal application was filed to apply for the assignment. At this writing, the record on the proposed assignment remains open. Analysis of the legality of the entity's actions in entering into the assignment is a proper part of the inquiry in this license renewal.

The Opposition disputes that contracting for the sale to WPLN was beyond the authority of the entity, citing boilerplate as to general powers in the entity's charter. *See* Opp. pp. 4-5. But that language does not override the far more specific boilerplate statement, relating back to the one express purpose for the organization's existence: "The means, assets, income or other property of the corporation shall not be employed, directly or indirectly, for any other purpose whatever than to accomplish the legitimate means of its creation. . . ."[6] In turn this refers back to the only express purpose in the Articles: "[T]he operation, publication and dissemination of student communication media at Vanderbilt University." *Id.*, p. 1.

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5 Application was made on August 8: BALED – 20120808ABQ.

6 Exhibit A to Decl. Of Joseph Helm supporting Petition, p. 2.

The Opposition submits as Exhibit 1 an opinion letter from applicant's outside attorney, Thomas J. Sherrard (licensed to practice in Tennessee). The Sherrard Ltr. is well stated, meticulous, and so far as we know accurate as a statement of Tennessee law. Unfortunately for the applicant's contentions, it lends no support to the central argument. Mr. Sherrard begins by noting that the Board of Directors, pursuant to the by laws, have authority to contract. Therefore the board has the "apparent authority" to consummate the sale of WRVU. Sherrard Ltr., p.2. It is unclear whether this is Mr. Sherrard's legal conclusion, or merely an assumption on his part. In any event, he goes on to analyze compliance of the sale with State law. He begins by noting that Vanderbilt University is the sole member of the entity, Vanderbilt Student Communications. He comments that the University has adopted a "hands off" approach to management, delegating operational responsibility to the VSC Board. He acknowledges that under Tennessee law a decision by a non-profit corporation to sell substantially all of its assets other than in the regular course of its activities must be approved by the member(s).[7] In this case such approval has *not* been given. So the issue of proper action, or ratification, is said to turn on whether the sale of WFCL constituted a sale of "substantially all" assets. In that regard, "Unfortunately, we have been unable to find any analysis of Tenn. Code Ann. Sec 48-62-102 under Tennessee case law or in published opinions of the Tennessee Attorney General." Sherrard Ltr., p. 4. He then examines at length the handling of this issue when similar language came on review under laws of the State of Delaware. *Id.*, pp. 3-5.

This case is distinguishable from the given facts in Delaware. As we stated in the Petition, VSC is charged in the by laws with "a directed responsibility to the students and community of Vanderbilt to provide for the preservation and improvement of these mediums of student media above all." Organizationally, the entity is operated in several divisions. The station is in a Primary Division, defined as "the flagship media outlets that are the foundation of the Corporation. These outlets publish, create and broadcast student

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7 Citing Tenn. Code Ann. Section 48-62-102, specifically 102(a)(1) and (b)(2).

content with the greatest regularity." Bylaws Appendix A, Part 3. Other lesser units of the organization are Supplementary Divisions, Affiliated Divisions, and Probationary Divisions. Notwithstanding what may be the law in Delaware as presented by Mr. Sherrard, the sale here is of "substantially all" assets because it involves a most important asset within the core mission and a core Division. It is relevant to the analysis that VSC, without University approval, is attempting to sell this key asset to a non-campus multi-station NPR member, for the inferior purpose of disseminating middle-brow classical music and network fare.

The Opposition (p. 5) offers the general proposition that the Commission declines to involve itself in the interpretation of State law, absent an adjudicated finding in State court. But the cases relied on have little relevancy here.[8] Those cases were held not applicable in a case where the Commission examined the State law *bona fides* of an LPFM applicant and found them wanting. *Blue Lake Academy, Inc.*, DA 05-1969 rel. July 12, 2005. In that matter it was necessary to ascertain the legal existence of the applicant entity under State law, and on that basis the application was dismissed. Distinguishing *Abundant Life* and *Fatima, supra*, the Commission noted that "a corporation's existence can be a relevant Commission inquiry." Id.[9] The State law question certainly is relevant here, if the applicant certified its compliance with the Rules during the license term, but had made an assignment, not only unauthorized during the fourteen months before the assignment application was filed, but also not within the powers conferred on VSC by State law or its own charter.

C. COMPOSITION OF THE THEN-CONSTITUTED VSC BOARD OF DIRECTORS NEVER WAS PROPERLY REPORTED TO THE COMMISSION AND THE BOARD LACKED AUTHORITY TO EXECUTE THE ASSIGNMENT APPLICATION

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8 *Abundant Life, Inc.*, 16 FCC Rcd 4972, 4974 (2001), and *Fatima Response, Inc.*, 14 FCC Rcd 18543, 18546 (1999).

9 *See also Edinboro Early School*, DA 10-2065 rel. October 27, 2010; *Foundation for the Annunciation*, DA 11-735 rel. April 25, 2011 (". . . there is an inherent contradiction in crediting the representations of an applicant that essentially ask us to ignore certain of its other representations, both those made in publicly filed documents and those made in the By laws that it adopted to govern itself."). *Id.* at 4.

The petition documented a series of board changes, some of them sudden and in violation of VSC's bylaws, negating the conclusion that a properly constituted and lawfully existing board had authority to assign the license or enter into the management agreement. The problem is aggravated by VSC's related failure to report several of these changes in ownership, as required, to the Commission. The opposition at pp. 11 – 14 claims that the issue of required reporting is "murky" and "not neatly covered by the statute or the regulation." *Id.* at 11.

In support of this argument, the opposition cites a 1973 case and a 1983 case, and notes that the issue of transfer of control of non-stock companies was the subject of a Notice of Inquiry, *Transfers of Control*, 4 FCC Rcd 3403 (1989), later terminated without positive rules. According to VSC, "the state of the law remains that there is no Commission policy for determining when a transfer of control of a non-stock entity occurred." *Id.* at 13. This argument was rejected by the Commission in ringing terms over 20 years ago:

> We reject BTW's argument insofar as it suggests that, because no general guidelines have been adopted to provide greater certainty in assessing control questions, the Commission is impotent in dealing with any issue concerning an unauthorized transfer of control of a non-profit educational permittee or licensee. Obviously, such is not, nor should be, the case. *See Pacifica Foundation*, 36 FCC 2d 147 (1964).

Black Television Workshop, 6 FCC Rcd. 6525 at 6526 (1991). In that case the attempt to limit the question merely to whether a transfer was "gradual" or "abrupt" was rejected, given the Commission's legitimate concerns over whether control was transferred without approval and collateral issues of whether misrepresentation had occurred. All such issues are present in the facts presented here. As stated in the Instructions to FCC Form No. 316, the Commission reserves the right to determine on a case by case basis whether or not a positive transfer of control has taken place.[10]

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10 See Instructions to FCC Form NO. 316: "Generally, use of this form is prohibited if the previously approved principals of the licensee/permittee will not retain more than 50 percent of the station's voting rights or when more than 50 percent of the station's voting rights is being assigned or transferred, irrespective of whether or not the recipient(s) are already holders of such stock. The Commission reserves

The petition here asserted facts identifying numerous transfers of control during the time that VSC was entering into the Purchase Agreement and Management Agreement. Petitioner noted that between March and August 2010, the VSC Board of Directors underwent majority change that should have triggered the filing of Form 315, with another shift in majority control occurring between August 2010 and August 2011. *See* Petition at pp.10-11. Each of these changes should have triggered the filing of a Form 315. These unauthorized changes in Board control were compounded by VSC's pattern and practice of failing to notify the Commission of changes in Board control throughout the license term, including during the years 2004-2005, 2005-2006 and 2008. *Id.* at 11-14. The opposition does not contest these changes in majority control, nor the fact that VSC was aware of the need to file Form 315 given its prior filing of that form in February 2004 with respect to an earlier change in the Board of Directors' composition, and the continuity of station supervision throughout this period. *Id.* at 13-14.

Given the above, VSC's argument that the Commission never told the public what constituted a reportable transfer of control of a non-commercial station is ridiculous and should not be taken seriously. Rather, hearing is warranted on the issue of whether these and other changes to VSC's Board during the license term violated the law or Commission rules, including 47 U.S.C. Section 309(b) and Section 73.3540 of the Rules.

D. APPLICANT'S CONTRACTS WITH THE BUYER/PROGRAMMER VIOLATE COMMISSION POLICY, NOTWITHSTANDING THE RECENT KUSF CONSENT DECREE

In the case of *University of San Francisco*, DA 12-725 (M.B. Rel. on June 7, 2012) ("*U.S.F.*") the Commission confronted an applicant who had entered into a management agreement with a prospective purchaser, in exchange for the defrayal of all expenses, plus a fee of $5,000 per month for the initial four months, and $7,000 per month for so long as the agreement was in effect (presumably until the sale was consummated). The Media Bureau

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the right to require the parties to file an application for consent to the proposed transaction on FCC Forms 314 or 315 (or FCC Form 345 if an FM or TV translator or low power television station is involved)."

and the licensee entered into a consent decree which included, *inter alia*, the express admission (*Id.* Para. 11(a)) that the fee violated Section 73.503(c) of the Rules, in effect by the licensee selling noncommercial radio air time.

Here the manager/buyer was making a "down payment" of $300,000, plus another $150,000 on the first anniversary of the agreement. We stated that these were program fees, revealing the same violation as occurred with *U.S.F., supra.* (Of course the amounts were vastly larger.) In opposition the licensee submits Exhibit 2, the declaration of Chris Carroll, Director of Student Media. He states that the buyer was going to take time to close beyond the "normal" three to four months:

> Under the delayed scenario, during the interval, VSC would have neither the benefit of the use of the station nor the use of the money represented by the purchase price. This is what led to the provision in the purchase agreement for a significant down payment, or deposit, of $300,000 at signing, and a second deposit of $150,000 if the buyer had not initiated the FCC assignment application process by the date one year after the contract was executed.

Id. at p.2. We submit that this statement is a crystal clear admission that the amounts were compensation for VSC's relinquishment of its airtime. The attempt to distinguish *U.S.F., supra*, has failed. Our petition pointed out that here, interest on these sums went to seller, that the parties anticipated the sale could take "two to three years" to consummate, and that the agreement was ambiguous as to who kept the money if the sale was even further delayed. On these points the opposition is silent. Mr. Carroll does state: "These payments were not intended to be compensation for air time." *Id.* This is a sworn legal conclusion, entitled to no weight. It is up to the Commission, not to Mr. Carroll, to connect the dots and find correctly that the licensee has violated Sec. 73.503(c) of the Rules.[11]

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11 The licensee also refers to the press release issued by the chief of the Media Bureau in conjunction with *University of San Francisco*, stating that the consent decree was not intended as a signal that would to restrict "other types of contracts. . . " (Opp. p. 16). The present case shows exactly why that settlement should not be viewed as a license to expand management agreements in noncommercial broadcasting. To the contrary, it seems clear that management agreements by noncommercial entities should be barred. Only these entities, and not their commercial counterparts, are subject to eligibility criteria that involve both the legal structure and the program service to be provided. Fortunately, Mr. Lake's press release has

E. VSC'S LOCAL MANAGEMENT AGREEMENT WITH NASHVILLE PUBLIC RADIO CONSTITUTED AN IMPROPER DELEGATION OF CONTROL

Petitioners noted that the Management and Programming Agreement, as structured, amounted to a comprehensive transfer of control over station operations to WPLN. *See* Petition at pp. 18-22. In response, the opposition cites to the declaration of Chris Carroll, who claims that VSC continues to stream programming over the Internet from its main studio and thus retains the ability to preempt any programming provided remotely by Nashville Public Radio. However, the Carroll declaration fails to cite a single instance where programming provided by Nashville Public Radio was either preempted or rejected by the Licensee. Nor is any instance cited in which VSC broadcast its own content since the takeover. Simply because VSC operates an existing Internet station in its former main studio does not by itself suggest that it retains the requisite control over station operations.

The Carroll declaration also offers the conclusory statement that he confers with WPLN staff and "regularly monitor[s]" their on-air programming, without any further clarification as to whether this task is performed daily, weekly or merely once a month. Given his existing full-time position as Director of Student Media for VSC, which includes oversight of media created by Vanderbilt University students, it is unclear how much time Mr. Carroll can actually devote to monitoring third party content provided by WPLN. Under the circumstances, the narrowly drafted, legalistic and uncorroborated Carroll declaration, unaccompanied by exhibits or other supporting facts, offers little in rebuttal, when the express terms of the delegation of powers to the manager here are exceptionally broad. Nothing stated in the opposition overcomes the natural reading of this sweeping abdication of all programming, personnel, operational and other decisions to WPLN.

The Opposition takes particular exception to our highlighting a term we properly described as "outlandish," whereby WPLN could terminate the agreement if VSC

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no standing either as an adjudication or as an adopted rule, and the Commission is free to change course again in the future.

unreasonably interfered with management or programming. "In any relationship, a party always has the right to withdraw. This provision actually demonstrates VSC's continued control over the station." Opp. at 18. Not so. The MPA goes hand in hand with the asset purchase, and these instruments are enforceable bilateral contracts. "Unreasonable interference" under the management agreement would breach a covenant of the asset purchase (Par. 4(a)(1)) that Seller will not take any action that could reasonably be expected to have a material adverse effect on the Assets or the Station or Buyer's rights and interests under this Agreement." Thereafter Buyer at its election could either demand and enforce specific performance in the sale (Par. 19(d)(ii)), or get its deposits of $450,000.00 back (Par. 19(d)(iii)). The opposition claim that a licensee could or would provide independent oversight, with this sword over its head, replaces market realities with magical thinking.

F. THE OPPOSITION CONFIRMS PETITIONER'S CONTENTION THAT THE RENEWAL MUST NOT BE ACTED UPON UNTIL THE ASSIGNMENT PASSES THROUGH ITS PUBLIC PROTEST PERIOD, AND BASED ON THE FULL RECORD, IS ACTED UPON BY THE COMMISSION

Petitioner noted that while the Purchase Agreement and MPA are pending "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." Petition at 27. Petitioner suggested the Commission could thus defer action on the renewal until the Purchase Agreement is withdrawn, or alternately, implemented with an assignment application, with public notice and a legal right of petition. *Id.* That option is now before the Commission given the licensee's recent submission of an assignment application (Opp., fn. 37), no doubt prompted by Petitioner's legal arguments.

The Opposition ignores this common sense approach and cites two instances where station licenses were renewed -- one while a Form 315 transfer of control application was pending, and another where an assignment application was filed approximately five weeks

before the renewal deadline.[12] Opp. at p. 21. Both examples are factually distinguishable inasmuch as they did not involve licensees who prematurely abandoned control of station operations or routinely violated Commission rules. Both were uncontested. The latter case cited (Opp., p. 22) actually supports Petitioner's contention because there the routine assignment of an FM translator, W291CF, was approved conditionally, with a requirement that the assignment not be consummated until the intertwined renewal was granted (BALFT-20111026AEY, granted on December 15, 2011). Action on the present renewal application should be held in abeyance until the Commission has an opportunity to weigh in on the assignment application after the public protest period has been completed and a full record has been developed. Such an approach will avoid duplicative proceedings, promote administrative efficiency and lead to a ruling based on a full and complete factual record. The Opposition advances no legal or policy argument for bifurcated, and largely duplicative proceedings.

CONCLUSION

Petitioner WRVU Friends and Family respectfully suggests that the Commission is unable to find, based on this record, that the renewal of this license would serve the public interest, convenience and necessity. Because VSC has made no showing that it is a qualified licensee, because its *de facto* transfer of the license violates Commission rules, and because this improper transfer substantially diminishes broadcast localism and diversity, renewal of the license is not in the public interest. Similarly, WPLN's exercise of total control over WRVU's operations and its failure to comply with Commission rules under the LMA also demonstrate 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.

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12 *Roger Williams University*, 25 FCC Rcd 2710 (MB 2010) and Assignment Authorization, Form 732, in application File No. BALFTY-20111026AEY.

For the above reasons, the Commission should designate the application for hearing on issues, exploring the licensee's stewardship during the term, and ultimately determining on the record in hearing whether renewal of VSC's license is in the public interest.

Respectfully submitted,

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August 23, 2012

Counsel for WRVU Friends and Family

CERTIFICATE OF SERVICE

On August 23, 2012, the above PETITION TO OPPOSITION TO PETITION TO DENY was served by United States Mail, postage prepaid to the following addressees:

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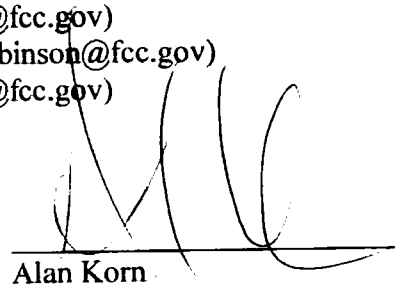

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