

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

In re Applications of)
))
THE KRALOWEC CHILDREN'S)
FAMILY TRUST)
(Assignor))
) File No. BAPCT-970404IB
and) File No. BAPTVL-970507ID
))
PAXSON COMMUNICATIONS)
CORPORATION)
(Assignee))
))
For Assignment of Construction)
Permits for KKAG(TV), Porterville,)
California and K09XA, Fresno,)
California)
))
ARTHUR C. KRALOWEC) File No. BMPCT-900717KF
) File No. BMPCT-910419KH
))
For Modification of Facilities)
and for Extension of Time to Construct)
KKAK(TV), Porterville, California)
))
ARTHUR C. KRALOWEC)
(Assignor))
))
and) File No. BAPCT-900719KG
))
KRALOWEC CHILDREN'S)
FAMILY TRUST)
(Assignee))
))
For pro forma Assignment of)
Construction Permit for KKAK(TV))
Porterville, California)

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1997

Released: November 25, 1997

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it for consideration the above-captioned applications to assign the construction permit for KKAG(TV), Channel 61, Porterville, California (formerly KKAK(TV)), and low power television station K09XA, Fresno, California, from the Kralowec Children's Family Trust (the Trust) to Paxson Communications Corporation. Pappas Telecasting Incorporated (Pappas), licensee of KMPH(TV), Visalia, California, which competes with KKAG(TV), filed a Petition to Deny the assignment application. Pappas also filed: (1) a Petition for Reconsideration of the Video Services Division's decision in *Arthur C. Kralowec*, 6 FCC Rcd 5265 (1991), granting the above-captioned applications for modification and extension of time to construct KKAG(TV) and for the pro forma assignment of the construction permit from Arthur C. Kralowec to the Trust; and (2) a Petition to Revoke Construction Permit of KKAG(TV). Because the issues and allegations raised in the petitions filed by Pappas are interrelated, we will consider them together in this order.¹

2. Background. In 1987, Kralowec was one of six competing applicants for the television channel allocated to Porterville. By November of that year, the competing applicants had withdrawn their applications by settlement agreement or otherwise, and all that remained was for the Presiding Administrative Law Judge to approve the settlement agreement. In December 1987, while his application was pending, Kralowec assigned his interest in the application to the Trust, of which he is the sole voting trustee.² Kralowec, however, failed to amend his pending application, and when the application was granted in May 1988 pursuant to the settlement agreement, the construction permit was issued to Kralowec as the sole proprietor.

3. In the Fall of 1989 a claim arose from a local civil suit, which resulted in a judgment against Kralowec in the amount of \$43,500.³ According to Kralowec, he did not have adequate cash reserves to immediately satisfy the judgment, and upon advice of local counsel, filed for bankruptcy on October 19, 1989, pursuant to Chapter 13 of the Bankruptcy Code, which allowed him to pay the debt over a 36 month period. In his initial listing of assets for the Bankruptcy Court, Kralowec did not include the television construction permit. In January 1990, however, he amended his listing of assets to report the construction permit, but assigned it no value. On February 21, 1990, the bankruptcy judge ruled that Kralowec's plan had been "proposed in good faith," and the court established a schedule for the payment of the judgment to the City, which Kralowec timely discharged.

¹ During the course of this proceeding, the parties opposed requests for extensions of time to respond to pleadings. In the interest of developing a complete record, we have considered all of the pleadings filed by the parties.

² The beneficiaries of the Trust are Kralowec's children, Kimberly, Kathleen and Charles Kralowec. Kralowec describes the Trust as a "savings vehicle established to provide funds for [his] childrens' educational needs."

³ Kralowec is a practicing attorney, and the judgment was the amount of a fine imposed after a mistrial in an action which he filed on behalf of a client against the City of Porterville.

4. According to Kralowec, over a year after he had transferred his interest in the proposed station to the Trust, he mentioned the fact to his communications attorney and learned for the first time that prior Commission consent was required. Accordingly, Kralowec filed the above-captioned application for consent to the pro forma assignment of the construction permit to the Trust. Around the same time he also concluded that the proposed station would be better able to compete if the transmitter site was moved to Blue Ridge Peak, approximately 17 miles north of the authorized site and closer to the larger communities of Fresno and Visalia. Because the Commission's records still indicated that Kralowec was the permittee, he filed the above-captioned modification application in his name, rather than the Trust's. Pappas and Sanger Telecasters, Inc., licensee of KMSG-TV, Sanger, California, filed informal objections to both the modification and assignment applications, alleging that the applications should be denied because: (1) an unauthorized transfer of control of the construction permit to the Trust had taken place; (2) Kralowec misled the Bankruptcy Court and the Commission regarding various matters related to the construction permit, and was no longer financially qualified; (3) the modification application was untimely and would result in shadowing to over 20 percent of the area of Porterville; (4) Kralowec had engaged in premature construction of the as-yet unauthorized facility; and (5) Melvin Querio, a television executive, and Martin Jackson, a consultant hired by Kralowec to assist in constructing the station, had an undisclosed ownership interest in the construction permit.

5. By Memorandum Opinion and Order released August 19, 1991, the Division fully considered the matters raised in the informal objections and found that while Kralowec failed to timely report the assignment of his interest to the Trust, he retained voting control at all times, and there was no evidence that he intended to conceal pertinent information from the Commission or had engaged in numerous reporting violations. The Division also rejected the allegations that Kralowec had engaged in bankruptcy fraud and that the bankruptcy filing demonstrated that he was no longer financially qualified. In addition, the Division concluded that no premature construction had taken place,⁴ and that Pappas failed to demonstrate that shadowing within the community of license would be as extensive as alleged. Finally, Querio and Jackson provided declarations denying that they had any ownership interest in the construction permit, and the Division concluded that the objectors had failed to raise an issue regarding ownership of the permit.

6. On reconsideration, Pappas complains that "the Bureau ignored the [serious] implications and failed to follow through in demanding that Kralowec respond," and listed fifteen

⁴ At that time, Falcon Cable Co. (Falcon) owned a transmitter building at Blue Ridge Peak, which it agreed to share with KKAG(TV). Pappas argued that Falcon had begun constructing an addition for KKAG(TV) while Kralowec's modification application to move to Blue Ridge Peak was still pending. In response, Falcon's Vice President stated that it was constructing an "all-purpose structure" which would be leased to another entity if Kralowec did not use it. With respect to the photographs Pappas provided, and which purported to show that the KKAG(TV) equipment had been installed on Blue Ridge Peak, Kralowec submitted affidavits from Falcon and Jackson stating that the photographed equipment was owned by Falcon and used solely for its cable system.

"questions [which] remain unanswered"⁵ Shortly thereafter, Pappas filed its petition to revoke, alleging that it recently obtained a further declaration from Martin Jackson, which "reinforces beyond all doubt the allegations made by Pappas." Jackson's second declaration contradicts his earlier statement that he had no ownership interest in the construction permit, but instead states that on or about September 15, 1990, "Kralowec/The Kralowec Children's Family Trust/KKAK-TV, Inc. agreed to issue stock to [Jackson, Querio and Hans J. Hansen] in exchange for their investments in the construction permit." According to Jackson, while the "oral commitment" was reduced to writing, the agreement was not executed "at the direction of Kralowec and/or other counsel only for the purpose of not filing such information with the FCC" In its petition to deny the assignment from the Trust to Paxson, Pappas reiterates arguments made in its informal objection and petition to revoke and contends, citing *Jefferson Radio Co., Inc.*, 340 F.2d 781 (D.C. Cir. 1964), that substantial and material questions of fact exist regarding Kralowec's basic qualifications, which require that the Commission either conduct a revocation hearing or deny the assignment application.⁶ According to Pappas, Kralowec has deliberately and repeatedly deceived the Commission as to the operation and control of KKAG(TV), and shown a repeated disregard for the Commission's rules, which renders him unfit to operate KKAG(TV) or benefit from its sale.

7. Discussion. In assessing the merits of a petition to deny, a two-step process is required under Section 309(d)(1) and (2) of the Communications Act of 1934, as amended. 47 U.S.C. § 309(d)(1), (2); *see also Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). The first test is whether the petition demonstrates by specific allegations of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. If such a *prima facie* case is alleged, the second test is whether -- on the basis of the application, the pleadings, or other matters of which the Commission may take official notice -- a substantial and material question of fact is presented to warrant further inquiry in a hearing. We agree with Pappas that a licensee's duty of candor is critical to our licensing processes. *See*,

⁵ The 15 "unanswered questions" listed in the petition for reconsideration are repetitive and merely contradict the Division's conclusion that no further inquiry was necessary in connection with: (1) the assignment to the Trust; (2) Kralowec's bankruptcy filing, including whether any misrepresentations were made and its impact on the permittee's financial qualifications; (3) the ownership structure of the permittee; (4) whether unauthorized construction had taken place; and (5) the extent of shadowing to portions of Porterville. It is well established that reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *see also Eagle Radio, Inc.*, 12 FCC Rcd 5105 (1997) ("Reconsideration will not be granted for the purpose of debating matters on which we have already deliberated and spoken.")

⁶ Under the Commission's long-held *Jefferson Radio* policy, a transfer or assignment application cannot be granted when there are unresolved issues concerning the seller's basic qualifications. *See, e.g., Quests, Inc.*, 7 FCC Rcd 29, 30 (1991) and cases cited therein; *review denied*, 7 FCC Rcd 5273 (1992).

e.g., Fox Television Stations, 10 FCC Rcd 8452, 8478 (1995).⁷ Applying Commission precedent to the facts and allegations before us, however, we conclude that Pappas has failed, by a wide margin, to raise a substantial and material question of fact which would require a hearing or otherwise support denial of the assignment application, for the reasons discussed below.⁸

8. Assignment to the Children's Trust. Pappas asserts that Kralowec engaged in a "deliberate violation" of Section 1.65 of the Commission's rules by concealing from the Commission that he had transferred equitable interest in the construction permit to the Trust in December 1987, and that this violation impacts on his qualifications to be a Commission licensee.⁹ It is well settled that an inquiry into a failure to report under Section 1.65 is warranted only where there is an intent to conceal facts from the Commission, or a pattern of repeated violations or other factors reflecting significant carelessness or inattentiveness. *See Richardson Broadcast Group*, 7 FCC Rcd 1583, 1587-88 (1992); *KWQJ(FM), Anchorage, Alaska*, 10 FCC Rcd 8774, 8776 (1995). Pappas has presented no new arguments or evidence which would require reconsideration of our earlier conclusion that Kralowec's failure to report the transfer of equitable ownership in a timely manner was not fatal to his pending applications. Accordingly, we find that no substantial or material question of fact exists in this regard.¹⁰

⁷ The duty of candor requires an applicant to be "fully forthcoming as to all facts and information relevant" to its application. *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994) (citing *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1211 (1986)). A party's intent to deceive, however, is an essential element of a violation of the duty of candor. *Swan Creek*, 39 F.3d at 1222; *Garden State Broadcasting Ltd. Partnership v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *Fox River Broadcasting, Inc.*, 102 FCC 2d 1179, 1196 (1986). Thus, before an applicant or licensee can be found to have withheld relevant information, it must be shown that the party knew that the information was relevant and intended to withhold it. *See Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993) (no lack of candor where filing was misleading, but made without intent to deceive).

⁸ Our decision here is based upon consideration of the facts and arguments raised in both the petition to deny the assignment application and Pappas' earlier petitions for reconsideration and revocation, which were incorporated by reference in the petition to deny. Whether considered separately or collectively, the petitions do not present a substantial and material question of fact warranting further Commission consideration.

⁹ Section 1.65(a) of the Commission's rules requires an applicant to inform the Commission within 30 days of any significant changes as to any matter that may be of decisional significance in the consideration of its application.

¹⁰ While Pappas characterizes Kralowec's transfer to the Trust as "part of Kralowec's maneuvers in anticipation of his declaration of personal bankruptcy on October 19, 1989, whereby he sought to isolate certain of his assets from creditors," and an "effort to shield the permit from both the FCC and creditors," the record is entirely devoid of facts to support these insinuations. Pappas does not refute Kralowec's statement, under penalty of perjury, that once it appeared to Kralowec that his application would be granted, he "assigned my rights in it to my childrens' trust as I have done with other property" in December 1987. Pappas also offers no evidence to refute Kralowec's explanation that his bankruptcy filing was precipitated by a fine imposed against him in the fall of 1989 after a mistrial was declared in a case in which Kralowec was representing a client against the City of Porterville. Thus, we fail to see how Kralowec's December 1987 transfer to the Trust could be related to his decision to file for Chapter 13 protection almost two years later. Pappas's assertion that "the court sanction of the \$43,000 fine imposed on Kralowec had to have developed over a long period of time before it was arrived at [and] Kralowec knew

9. Bankruptcy Filing. Pappas contends that Kralowec's 1989 Chapter 13 bankruptcy filing raises numerous unresolved issues which need to be explored through an evidentiary hearing. We disagree. With respect to the charge that Kralowec committed bankruptcy fraud in connection with his Chapter 13 filing, we see no reason to revisit these allegations, which were fully considered and rejected by the bankruptcy court and the Department of Justice in 1990.¹¹ The Commission typically defers to a bankruptcy court's determination concerning matters over which the court has jurisdiction,¹² and Pappas has presented no reason why we should deviate from established policy in this case.

10. We also disagree with Pappas' assertion that Kralowec's bankruptcy filing in late 1989 raised an issue regarding the financial qualifications of Kralowec and the Trust which required a hearing. Applicants for new broadcast stations and proposed assignees of broadcast permits and licenses are required to certify that they have sufficient capital to construct the station and operate for three months without advertising or other broadcast revenue. Once a construction permit is granted, however, the Commission typically does not exercise continuing oversight regarding a permittee's finances. See *Deletion of Noncommercial Reservation of Channel *16*, 11 FCC Rcd 11700, 11712 (1996); *Cannon Communications Corporation*, 6 FCC Rcd 570 (1991). In addition, the Chapter 13 trustee confirmed that the bankruptcy filing did not affect Kralowec's solvency or ability to incur post-petition debt, and Kralowec promptly constructed the station upon grant of the modification application. Thus, Pappas has failed to demonstrate how Kralowec's Chapter 13 bankruptcy filing adversely affected the ability of Kralowec and the Trust to obtain financing to construct and operate the station. We also conclude that because the bankruptcy filing was of no decisional significance, Kralowec was not

perfectly well it was coming" is inconsistent with the record.

¹¹ The City of Porterville had filed a motion to dismiss the Chapter 13 case, alleging, *inter alia*, that Kralowec failed to disclose all of his assets, including the construction permit, and improperly used the Chapter 13 filing "to stay enforcement of a valid judgement in favor of the City of Porterville . . . while the Debtor's appeal is being heard in the California State Courts." The bankruptcy court considered the City's allegations, and confirmed Kralowec's bankruptcy plan by Order dated February 21, 1990, finding that the plan fully complied with the Bankruptcy Code and "has been proposed in good faith and not by any means forbidden by law." In December 1990, an attorney representing Pappas submitted materials to the judge and court-appointed trustee assigned to Kralowec's case, which, he asserted, showed that Kralowec had made statements under oath before the Commission which were inconsistent with representations made to the court. The bankruptcy judge referred the matter to the Department of Justice, Office of the United States Trustee, which informed Pappas' attorney, by letter dated January 7, 1991, that "the court and the trustee had full knowledge of the debtor's assets and . . . [t]his office sees no ground to challenge the administration of the case."

¹² See, e.g., *Sam Jones, Jr.*, 10 FCC Rcd 5330, 5342 (1995)("[T]he Commission has traditionally deferred to the bankruptcy court's determination concerning a debtor's financial status, because that forum has jurisdiction to decide these matters.")

required to report the fact to the Commission.¹³

11. Ownership and Control of KKAG(TV). Pappas first contended, in a supplement to its informal objection, that Jackson and Querio had an undisclosed ownership interest, based upon a hearsay declaration of Pappas' consulting engineer. In response, Kralowec acknowledged that he had discussions with Querio, Jackson and others about investing in the station, but that no agreements had been reached. Querio and Jackson also submitted declarations stating that they had no ownership interest in the permit. Several months after the pro forma assignment and modification applications were granted, Pappas filed its petition to revoke, based upon a more recent declaration from Jackson stating that he, in fact, had a binding "oral commitment" to acquire a 16 percent ownership interest in KKAK-TV, Inc., a corporation which Kralowec created to acquire the construction permit from the Trust.¹⁴ In response, Kralowec again admits that he had discussions with these individuals and other potential investors, including Pappas, but that no definitive agreement was ever reached. Kralowec also questions the veracity of Jackson's second declaration, which was given to Pappas after Kralowec and the Trust filed a lawsuit against Jackson, alleging breach of contract, breach of fiduciary duty and fraud, and Jackson filed a cross-complaint for a judicial declaration that he was entitled to a 16 percent partnership interest in KKAG(TV).¹⁵ Finally, in supplemental filings, Kralowec provides deposition testimony in which Jackson concedes that his earlier declaration, stating that he had no ownership interest in KKAG(TV), was accurate, and the California court's order granting summary judgment and dismissing Jackson's cross-claim, based upon the finding that "the alleged oral agreement is unenforceable because it is lacking and uncertain in essential terms." Based upon the record before us, we conclude that Pappas has failed to raise a substantial and material question of fact

¹³ While permittees and licensees have a continuing obligation under Section 1.65(c) of the Commission's rules to report annually to the Commission any adverse finding or adverse final action taken by any court or administrative body that involves conduct bearing on its character qualifications and that would be reportable in connection with an application for renewal, the filing for bankruptcy protection is not the type of conduct which permittees and licensees are typically required to report to the Commission. See *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986). In addition, under Chapter 13 of the Bankruptcy Code, entitled "Adjustment of Debts of an Individual with Regular Income," the debtor remains in possession of all property of the estate. See 11 U.S.C. § 1306. Accordingly, a pro forma assignment of the construction permit to the Chapter 13 trustee was not required.

¹⁴ Pappas also submitted an unexecuted "Agreement of September 15, 1990," listing Jackson, Querio, Kralowec and Hans J. Hansen as parties, and describing the terms of a deal whereby the parties were to acquire stock in KKAK-TV, Inc., which would then become the licensee of KKAG(TV). According to Jackson, the agreement was never executed "at the direction of Kralowec and/or other counsel only for the purpose of not filing such information with the FCC"

¹⁵ According to Kralowec, Jackson's local lawyer threatened that unless the case was settled, "[w]e will pursue our cross complaint vigorously, not only in Superior Court, but at the FCC, where we expect Kralowec, et al. will be found either unfit to be an FCC licensee, or unable to obtain an extension of time in which to complete construction. In that matter we expect to retain [Pappas' communications counsel] to represent our interests." Pappas filed its petition to revoke some two months later.

regarding the ownership of station KKAG(TV). We also find no evidence that Kralowec intended to deceive the Commission concerning the ownership of the construction permit or withheld pertinent information. Section 1.65 of the Commission's rules "does not require parties to notify the Commission of a proposed transaction that is still being negotiated." *Nextel Communications, Inc.*, 10 FCC Rcd 3361, 3368 (WTB 1995); *see also Sparkling City Communications, Inc.*, 10 FCC Rcd 12220 (1995)(the execution of a letter of intent to negotiate an agreement to sell a broadcast station does not create a reporting obligation).

12. We also reject Pappas' claim that the Trust is a "sham," and that KKAK-TV, Inc. is the real owner and operator of the station, as based solely on speculation and surmise.¹⁶ The facts show that while Kralowec originally formed KKAK-TV, Inc. in October 1992 in anticipation of an agreement being reached for investors to become partial owners of the corporation, which would then acquire the construction permit from the trust, no agreement was ever reached. Kralowec then used the corporation as a vehicle to acquire equipment for use by the station, and to serve as the corporate obligor for various obligations of the station. In addition, at the time of incorporation the Trust owned all of the stock of KKAK-TV, Inc. and Kralowec is the sole officer and director of the corporation.¹⁷ Pappas has presented no evidence to suggest that the relationship between the Trust and KKAK-TV, Inc. contravenes the Commission's rules or the public interest. In addition, it is apparent from a fair and balanced reading of the parties' prolific submissions that the record is bare of any evidence which supports Pappas' speculation that Station KKAG(TV) has consistently operated "outside the rules." Absent specific factual allegations, supported by affidavit, we see no reason for further inquiry regarding the operations of KKAG(TV).

13. Other Matters. Pappas has presented no new information in support of its contention that the Division erred in granting the modification application because of unacceptable shadowing to Porterville, and concluding that Kralowec had not engaged in premature construction of the modified facilities. It is well established that reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters, and that it "will not be granted for the purpose of debating matters on which we have already deliberated and spoken." *Eagle Radio, Inc.*, 12 FCC Rcd at 5107. We have reexamined the record however, and conclude that our earlier decision was correct in all regards.

14. Conclusion. Accordingly, based on the foregoing, we find that petitioner Pappas Telecasting Incorporated has failed to raise a substantial and material question of fact requiring

¹⁶ For example, Pappas argues that because EEO reports filed with the Commission indicate that the Trust employs less than five full-time employees in the operation of the station, "[t]his makes clear that the entity operating Station KKAG(TV) is not the Kralowec Trust, but KKAK-TV, Inc." Pappas also claims that "the name, KKAK-TV, Inc., left no doubt that its organization was for the purpose of building and operating Station KKAG(TV)."

¹⁷ Kralowec states the Trust now owns 98.25 percent of the stock of KKAK-TV, Inc.

resolution in a hearing. We further find that the applicants are fully qualified and that a grant of the assignment application will serve the public interest, convenience and necessity.

15. Accordingly, the Petition to Deny, the Petition to Revoke Construction Permit, and the Petition for Reconsideration of the grant of the pro forma assignment and modification applications, filed by Pappas Telecasting Incorporated, ARE DENIED. Further, the applications for the assignment of construction permit of KKAG(TV) and K09XA from the Kralowec Children's Family Trust to Paxson Communications Corporation ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

**Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau**