

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

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

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 2017

Released: November 3, 2017

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration an Application for Review filed by Nalini Kapur, Rishi Kapur, and Ravi Kapur (the "Kapurs"), seeking review of three decisions by the Video Division (the "Division") of the Media Bureau: (1) the July 11, 2014, decision granting an application to assign the license of station KAXT-CD, San Francisco-San Jose, California (the "Station") from KAXT, LLC ("KAXT") to OTA Broadcasting (SFO), LLC ("OTA") ("Assignment Application"); (2) the March 26, 2015, decision that denied reconsideration of that grant of the Assignment Application and also dismissed in part and otherwise denied the Kapurs' petition to hold in abeyance action on the Station's application to renew the Station's license ("Renewal Application"), and granting that

1 Application for Review of Nalini Kapur, Rishi Kapur, and Ravi Kapur (filed Jan. 11, 2016) (the "AFR"). Oppositions to the AFR were filed on January 28, 2016 by Warren Trumbly ("Trumbly"), Linda Trumbly, Jeremy Noonan, Robyn Noonan, Alicia Torres, Herbert Alvarado and KAXT, LLC ("KAXT Opposition") and by OTA Broadcasting (SFO), LLC ("OTA Opposition"). The Kapurs filed a Consolidated Reply to the two oppositions on February 10, 2016 ("Kapurs Reply").

2 KAXT, LLC (Assignor) and OTA Broadcasting (SFO), LLC (Assignee) for Consent to Assign the License of Station KAXT-CD, San Francisco-San Jose, California, Memorandum Opinion and Order, 29 FCC Rcd 8266 (MB 2014) ("MO&O").

application,<sup>3</sup> and (3) the December 11, 2015, decision denying the Kapurs' April 27, 2015 Petition for Further Reconsideration of the grant of the Assignment Application, and their concurrently filed Petition for Reconsideration of the grant of the Renewal Application.<sup>4</sup> We disagree with the Kapurs that the Division's actions approving the assignment and renewing the license were contrary to law, and, for the following reasons, affirm those actions and deny the AFR.

## II. BACKGROUND

### A. Prior Decisions

2. From the outset, the Kapurs have taken issue with KAXT's sale of the Station to OTA.<sup>5</sup> In their Assignment Petition, they argued that the Assignment Application was not ripe for Commission consideration given their private dispute with KAXT as to whether Trumbly, another member of KAXT, had the requisite legal authority to have signed, on behalf of KAXT, the January 28, 2013 Asset Purchase Agreement contemplating the sale of the Station from KAXT to OTA ("APA"), as well as the Assignment Application.<sup>6</sup> This issue was the subject of arbitration, instituted by Trumbly and other members of KAXT in light of the Kapurs' claim, in which the arbitrator ultimately held that Trumbly possessed such legal authority,<sup>7</sup> concluding that the Kapurs collectively held only a minority (42%), noncontrolling interest in KAXT and that the other members, collectively holding the remaining 58%, had voted to authorize the sale.<sup>8</sup> On January 22, 2014, the arbitrator issued a Final Order so stating.<sup>9</sup> By letter to counsel for the Kapurs dated February 17, 2014, counsel for OTA noted that, in light of that ruling, OTA "would not tolerate" the Kapurs' continuing efforts to delay Commission approval of the assignment and demanded that, by February 21, 2014, the Kapurs notify the Commission of the arbitrator's ruling and withdraw the Assignment Petition.<sup>10</sup>

3. The Kapurs did not do so. Instead, on February 24, 2014, they filed a Supplement to their Assignment Petition, newly asserting that, based upon that letter, OTA lacked the necessary character qualifications to purchase the Station. In the letter, counsel for OTA had indicated that, if the

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<sup>3</sup> *KAXT, LLC (Assignor) and OTA Broadcasting (SFO), LLC (Assignee) for Consent to Assign the License of Station KAXT-CD, San Francisco-San Jose, California*, Memorandum Opinion and Order, 30 FCC Rcd 2691 (MB 2015) ("Reconsideration MO&O").

<sup>4</sup> *KAXT, LLC (Assignor) and OTA Broadcasting (SFO), LLC (Assignee) for Consent to Assign the License of Station KAXT-CD, San Francisco-San Jose, California*, Memorandum Opinion and Order, 30 FCC Rcd 14102 (MB 2015) ("Further Reconsideration MO&O").

<sup>5</sup> See Kapurs' Petition to Dismiss, Deny, or, in the Alternative, Hold Application in Abeyance (Mar. 18, 2013) ("Assignment Petition"), Att. B; KAXT Opposition to Assignment Petition, Decl. of Charles A. Tweedy (filed Mar. 29, 2013).

<sup>6</sup> See Assignment Petition at 5.

<sup>7</sup> The decision of the arbitrator was upheld by Superior Court of California, County of Sacramento, on April 24, 2014. See OTA's Supplement to Comments on Supplement to Petition to Dismiss, Deny or, in the Alternative, Hold Application in Abeyance (Apr. 24, 2014). That decision, in turn, was affirmed by the California Supreme Court and is accordingly final. See OTA Opposition at 4, citing *Kapur v. Trumbly*, No. C076804, 2015 WL 2329294 (Cal. App. Ct. May 14, 2015).

<sup>8</sup> This conclusion is consistent with KAXT's filings with the Commission. According to the final FCC Form 323 Ownership Report of KAXT dated December 20, 2013, the company is a limited liability company with individual persons as its members, including Nalini Kapur, Rishi Kapur, and Ravi Kapur, a parent and her two sons, who collectively hold a 42 percent interest in the company. See File No. BOA-20131211BEX.

<sup>9</sup> OTA Supplement to Comments on Assignment Petition, Ex. A.

<sup>10</sup> Kapurs' Supplement to Petition to Dismiss, Deny, or, in the Alternative, Hold Application in Abeyance (Feb. 24, 2014), Ex. A, Letter from C. William Phillips, Counsel for OTA, to Randolph Gaw, Counsel for the Kapurs (dated Feb. 17, 2014).

Kapurs failed to withdraw the Petition and cease their opposition by the stated deadline, OTA was prepared to pursue all available legal and equitable remedies against them, including actions for damages claiming tortious interference and malicious prosecution.<sup>11</sup> The Kapurs maintained that the letter constituted an impermissible threat, calling into question OTA's character qualifications to be a licensee.<sup>12</sup>

4. In the *MO&O* denying the Assignment Petition, the Division cited the Commission's policy not to adjudicate private contractual matters, concluding that it did not have to await the arbitrators' decision before it acted on the Assignment Application; noted that the arbitrator had determined that the APA was indeed validly signed by Trumbly; and concluded that there was no reason not to proceed with the review of the Assignment Application.<sup>13</sup> The *MO&O* also rejected the Kapurs' contention that OTA lacked the necessary character qualifications to purchase the Station due to its counsel's letter described above. The Division noted that applicants may enforce their contractual rights by pursuing all available legal relief without impermissibly infringing upon petitioners' rights, and that it was not persuaded that OTA's correspondence discouraged access to the Commission or participation by the public.<sup>14</sup> Accordingly, the Division granted the Assignment Application. KAXT and OTA consummated the assignment of the Station on July 11, 2014.<sup>15</sup>

5. On August 11, 2014, the Kapurs filed a Petition for Reconsideration<sup>16</sup> and three months later, filed the Renewal Petition, requesting that action on the Renewal Application be held in abeyance pending final action on reconsideration of the *MO&O*.<sup>17</sup> In the Assignment Reconsideration Petition, the Kapurs repeated their contentions rejected by the Division and added the following arguments: (1) a newly negotiated side letter between KAXT and OTA that allowed the closing, before final Commission approval, but held back 90% of the purchase price in escrow until finality was "inappropriate" and evidence of "bullying" on the part of OTA;<sup>18</sup> (2) the Assignment Application should have been amended to include such agreement;<sup>19</sup> and (3) OTA failed to amend the Assignment Application to report the Kapurs' character allegation against it related to OTA's counsel's letter.<sup>20</sup> In the Renewal Petition, the Kapurs repeated their previous contentions raised against the Assignment Application and rejected by the Division, and requested that no action be taken on the Renewal Application until those matters for which it had sought reconsideration had been finally resolved. They also repeated their arguments first raised on reconsideration about OTA's failure to disclose their rejected character allegation about the OTA counsel's letter in the Renewal Application and other pending applications<sup>21</sup> and those about the escrow

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<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> *MO&O*, 29 FCC Rcd at 8268-9 (citations omitted).

<sup>14</sup> *Id.* at 8269-70. In so holding, the *MO&O* cited *Fort Collins*, in which the Commission rejected a similar charge of harassment and held that an applicant's advising a petitioner that it might file suit if it does not withdraw its petitions does not justify a determination that a licensee lacked the requisite character qualifications. *Fort Collins Broadcast Co., Inc.*, Memorandum Opinion and Order, 38 FCC 2d 707, 711-12 (1972) ("*Fort Collins*").

<sup>15</sup> See OTA's Consummation Notice (Jul. 17, 2014).

<sup>16</sup> Kapurs' Petition for Reconsideration (Aug. 11, 2014) ("Assignment Reconsideration Petition").

<sup>17</sup> Kapurs' Petition to Hold Renewal Application in Abeyance (Nov. 3, 2014) ("Renewal Petition").

<sup>18</sup> Assignment Reconsideration Petition at 5-6, Att. B.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.* at 7-8.

<sup>21</sup> Renewal Petition at 4-6.

side letter.<sup>22</sup> They also newly argued that OTA's behavior in the assignment proceeding constituted a "pattern of violations" requiring designation for hearing of the Renewal Application under the Act.<sup>23</sup>

6. On March 26, 2015, the Division released the *Reconsideration MO&O*, in which it denied the Assignment Reconsideration Petition and dismissed, as moot, the portion of the Renewal Petition urging no action on the Renewal Application until the Division had so acted. It found all of the Kapurs' arguments for reconsideration to be reiterations of previously rejected arguments or otherwise unpersuasive.<sup>24</sup> In particular, it concluded that the Kapurs' contention that the *MO&O* had made unsupported factual findings with regard to OTA counsel's allegedly harassing correspondence had no merit, and was essentially a reargument of the Kapurs' contentions rejected in the *MO&O*.<sup>25</sup> The Division also found that the escrow side letter was not inappropriate and did not need to be filed as an amendment to the Renewal Application, as it was neither a significant nor substantial change to the application.<sup>26</sup> The Division did hold that OTA had "failed to update its Renewal Application as required by sections 1.65 and 1.17(a) of the Commission's rules" to report the Kapurs' character allegation against it that it had rejected in the *MO&O*.<sup>27</sup> However, it rejected their contention that such failure constituted a "serious" violation that would make a grant of the Renewal Application inconsistent with section 309(k) of the Act, since there was no evidence of intentional concealment, and granted the Renewal Application.<sup>28</sup>

7. On April 27, 2015, the Kapurs filed two pleadings in response to the *Reconsideration MO&O*: a Petition for Further Reconsideration of the Division's denial of reconsideration of the *MO&O*,<sup>29</sup> and a Petition for Reconsideration of its grant of the Renewal Application.<sup>30</sup> They also raised additional new matters, including one arising from a decision in one of their separate actions (through their company Diya TV) against KAXT and Trumbly. In the Petition for Further Reconsideration, the Kapurs noted that, although OTA had characterized itself to the Commission as "caught in the cross-fire of this intramural struggle for more than a year" and a party that "has waited patiently for the Kapurs and the controlling members of KAXT to resolve their differences-or have them settled by an arbitrator,"<sup>31</sup> in the *Diya TV Decision*, the judge observed that KAXT had "worked closely" with OTA and discussed strategy with it during the arbitration.<sup>32</sup> The Kapurs claimed this contradicted OTA's depiction of itself to the Commission as a neutral observer, having misrepresented its role and actually colluded against the Kapurs with KAXT, thus further calling to question OTA's character qualifications.<sup>33</sup>

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<sup>22</sup> *Id.* at 3-4.

<sup>23</sup> *Id.* at 5-7; 47 U.S.C. § 309(k)(1)(C).

<sup>24</sup> *Reconsideration MO&O*, 30 FCC Rcd at 2694.

<sup>25</sup> *Id.* at 2695.

<sup>26</sup> *Id.* at 2696.

<sup>27</sup> *Id.* at 2696 (citing 47 CFR §§ 1.17, 1.65).

<sup>28</sup> *Id.* at 2697.

<sup>29</sup> Kapurs' Petition for Further Reconsideration (filed Apr. 27, 2015) ("Further Reconsideration Petition").

<sup>30</sup> Kapurs' Petition for Reconsideration (filed Apr. 27, 2015). They attached the Further Reconsideration Petition to the filing and again asked that action on the Renewal Application be held in abeyance pending consideration of its arguments.

<sup>31</sup> Further Reconsideration Petition at 6 (citing KAXT's Comments on Supplement to Petition to Dismiss, Deny, or, in the Alternative, Hold Application in Abeyance (Mar. 17, 2014) at 2).

<sup>32</sup> *Id.* at 5-6 (citing *Diya TV, Inc. v. KAXT, LLC*, Statement of Decision Following Court Trial, No. 113-CV-245340 (Cal. Sup. Ct. Santa Clara Cnty., Apr. 1, 2015) ("*Diya TV Decision*").

<sup>33</sup> *Id.* at 8.

8. They also raised for the first time yet another character issue against OTA involving one of its interest holders, Todd Lawyer, who, on February 19, 2013, over two years earlier, had pled guilty to fraud, a fact that the Kapurs discovered apparently as a result of a letter agreement dated February 8, 2013 on file with the Commission insulating Lawyer from OTA (“Insulation Letter”) – a document repeatedly filed with the Commission by OTA in connection with its various stations as early as March 11, 2013 and available to the public.<sup>34</sup> The Kapurs argued that consideration of this new allegation was appropriate under 1.106(c) of the Commission’s rules.<sup>35</sup> They also maintained that, notwithstanding the Insulation Letter, Lawyer was improperly insulated,<sup>36</sup> and that the worksheets to the Assignment Application had required disclosure by OTA of the guilty plea, which it had failed to do.<sup>37</sup>

9. On December 11, 2015, the Division released the *Further Reconsideration MO&O*, in which it concluded that the Kapurs had not raised a substantial or material question regarding OTA’s fitness to be a licensee, offering only reiterations of previously considered arguments. With regard to the court’s findings in the *Diya TV Decision*, although the *Further Reconsideration MO&O* concluded that the argument was based on new information, it rejected the Kapurs’ contention that the claimed inconsistency by OTA had any bearing on the case before it, nor did it see any inaccuracy in OTA’s characterization of itself to the Commission.<sup>38</sup> It dismissed all of the other allegations by the Kapurs, including that regarding the guilty plea for fraud entered by OTA principal Lawyer, and the sufficiency of the related Insulation Letter, pursuant to section 1.106(c).<sup>39</sup> The Division noted that the Insulation Letter had been filed and publicly available months prior to the Kapurs’ pleadings considered in the *Reconsideration MO&O*. Accordingly, the Division concluded that, because the Kapurs had failed to demonstrate a good reason for their failure to have timely raised the Lawyer matter, it was barred from untimely raising it pursuant to section 1.106(c) and the arguments would accordingly not be considered.<sup>40</sup>

## B. Review Pleadings

10. *Application for Review.* The Kapurs allege in their AFR that “serious errors of law and fact” in the three Division decisions warrant Commission review.<sup>41</sup> They claim that the record raises clear questions regarding serious OTA misconduct.<sup>42</sup> They identify four sets of purported facts that warrant Commission review and reconsideration.<sup>43</sup> First, they assert that the threats by OTA in its

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<sup>34</sup> Further Reconsideration Petition at 9, n. 23, Att. D.

<sup>35</sup> 47 CFR § 1.106(c).

<sup>36</sup> Further Reconsideration Petition at 9. The Kapurs failed to demonstrate how the Insulation Letter, which references OTA’s Amended and Restated Limited Liability Company Agreement, and is signed by both Mr. Lawyer and OTA’s Vice President Marcello Liquori, is somehow deficient in so insulating Mr. Lawyer. The Kapurs also complained that they “can find no record of OTA broadcasting severing all ties with Lawyer.” They failed to explain why such a severing would be necessary in order to achieve the appropriate insulation of Lawyer from the operation of the Station under the broadcast attribution rules. See 47 CFR § 73.3555, note 2(f).

<sup>37</sup> *Id.* at 10.

<sup>38</sup> *Id.* at 14108; *Diya TV Decision*.

<sup>39</sup> Section 1.106(c) provides that, where a party seeks reconsideration based on an argument that it has previously failed to raise, the argument or the facts upon it is based must have been unknown to the filer until after its last opportunity to present them and it could not, through the exercise of ordinary diligence, have learned of them prior to that last opportunity. 47 CFR § 1.106(c)(1).

<sup>40</sup> The Division concluded that the other arguments were reiterations of previously denied arguments. *Further Reconsideration MO&O* at 14107.

<sup>41</sup> AFR at iii.

<sup>42</sup> *Id.* at 3-7.

<sup>43</sup> *Id.* at 7-16.

counsel's February 17, 2014 letter were disqualifying and in service of a larger, concealed effort to bully the Kapurs into abandoning their opposition to the Station sale.<sup>44</sup> Second, the AFR contends that OTA has failed to correct the false certification in the Renewal Application and elsewhere regarding outstanding character issues that led to admonishment by the Division. The Kapurs argue that the *Further Reconsideration MO&O* improperly failed to address these omissions.<sup>45</sup> Third, the AFR charges that the Division erred in rejecting the Kapurs' claim that OTA misrepresented its involvement with KAXT in the California arbitration proceeding.<sup>46</sup> Fourth, they point to the allegedly misrepresented insulation from OTA of convicted felon Todd Lawyer, and argue that the *Further Reconsideration MO&O* used an erroneous standard in refusing even to consider their allegation that OTA had falsely certified that no party to the Renewal Application was a felon.<sup>47</sup>

11. *OTA Opposition to Application for Review.* OTA responds that its counsel's letter to the Kapurs' attorney after the arbitrator had ruled in its favor constituted an appropriate effort by OTA to enforce its contract rights, pointing to Commission precedent that has affirmed as legitimate the exercise by applicants and licensees of their available legal remedies.<sup>48</sup> Second, OTA states that it did not intend to deceive when it failed to update the KAXT Renewal Application and other applications to report the Kapurs' character allegation because, at the time of filing, the Kapurs had not yet sought reconsideration of the *MO&O* rejecting the allegation that the counsel's letter was improper and that, at most, OTA was uncertain as to whether disclosure was required.<sup>49</sup> Third, OTA argues that it did not mislead the Division about its involvement in the Kapurs' disputes with KAXT and Trumbly. OTA asserts that the Kapurs ignore the Division's finding that OTA had never misrepresented that involvement.<sup>50</sup> In addition, OTA states that the Kapurs mischaracterized the judge's findings in the private *Diya TV* litigation that formed the basis of their misrepresentation contention.<sup>51</sup> Fourth, OTA states that it took timely and appropriate steps to insulate Todd Lawyer consistent with the Commission's rules, making disclosure of the felony in applications unnecessary, and that the Kapurs have failed to meet their burden to demonstrate that facts regarding Lawyer were not known "and could not, through the exercise of ordinary diligence," have been raised earlier in the proceeding.<sup>52</sup>

12. *KAXT Opposition to Application for Review.* KAXT responds that the Kapurs' contention that OTA misrepresented its activities in the *Diya TV* litigation is a gross exaggeration of what the court held in the *Diya TV* decision, primarily because OTA was not a party and did not appear before the court in such litigation. KAXT emphasizes that the APA between it and OTA was public, and that there was no secret understanding between OTA and KAXT to gain something illegally, to defraud the Kapurs of their rights, or to appear as adversaries though in agreement. KAXT also maintains that the fact that the buyer and a seller of property both sought to consummate the sale and communicate about

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<sup>44</sup> *Id.* at 14-15.

<sup>45</sup> *Id.* at 11-12.

<sup>46</sup> *Id.* at 12-14.

<sup>47</sup> *Id.* at 7-11.

<sup>48</sup> OTA Opposition at 13-14.

<sup>49</sup> *Id.* at 14-15.

<sup>50</sup> *Id.* at 16 (citing *Further Reconsideration MO&O* at 14108).

<sup>51</sup> *Id.* at 16 (citing AFR at 13).

<sup>52</sup> *Id.* at 19-20.

the progress of that effort, in accordance with their contractual obligations,<sup>53</sup> does not amount to collusion, especially when, as here, the APA was found to be valid and enforceable.<sup>54</sup>

13. *Kapurs' Consolidated Reply.* In their Consolidated Reply, the Kapurs continue to dispute OTA's contention that OTA's counsel's February 17, 2014, letter was not improperly threatening.<sup>55</sup> They also assert that OTA's Opposition confirms its approach "of defiance" to regulatory compliance obligations by failing to admit that it was wrong in falsely certifying the accuracy and completeness of its responses in the Renewal Application and its other applications; its refusal to correct those deficiencies post-admonition; and its continued reliance on an explanation for those failings that the Division has explicitly rejected.<sup>56</sup> The Kapurs also again maintain that OTA's non-disclosure of the Lawyer conviction in the Renewal Application is disqualifying.<sup>57</sup> Finally, they also reargue that OTA's representation to the Commission that it was an uninvolved bystander to the California arbitration is not consistent with the California court's finding in the *Diya TV* litigation that it had strategized with the KAXT and the Trumbly litigants.<sup>58</sup>

### III. DISCUSSION

14. At the outset, we note that the focus of the AFR reflects the shift in the Kapurs' attack on the sale of the Station by KAXT to OTA, which was initially confined to their contention that KAXT member Trumbly lacked the requisite authority to bind the licensee to that transaction by signing the APA with OTA, and then the Assignment Application. The Kapurs rested their argument on the pendency of the arbitration proceeding, which Trumbly and other KAXT members had commenced, not as an acknowledgement of the weakness of his authority as the Kapurs maintained to the Commission,<sup>59</sup> but because the Kapurs had strongly opposed the sale when it was first vetted at a meeting of the KAXT members and expressed their intention to block it.<sup>60</sup> In order to legally put the question to rest in light of the magnitude of the transaction, Trumbly and other KAXT members commenced the arbitration proceeding.<sup>61</sup> The arbitrator confirmed that Trumbly, representing the vote of the majority principals of the licensee, had the legal authority to commit the company to the transaction with OTA. The Kapurs do not contend to the contrary in the AFR. Instead, they have abandoned their only timely-raised argument, and have instead serially raised other arguments opposing Commission approval of the assignment, contentions that the Division has found to be without merit or improperly raised. For the following reasons, we agree with the Division's assessments and affirm its rejection, as meritless, of each such argument.<sup>62</sup>

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<sup>53</sup> APA at 4, Para. 2.1 ("FCC Consent; Assignment Application": "Buyer and Seller shall take all reasonable steps to cooperate with each other and with the FCC in order to secure [FCC approval of the assignment of the Station to OTA] without delay and to promptly consummate the transaction contemplated in this Agreement.").

<sup>54</sup> KAXT Opposition at 4-5.

<sup>55</sup> Kapurs Reply at 7-9.

<sup>56</sup> *Id.* at 3-5.

<sup>57</sup> *Id.* at 4-6.

<sup>58</sup> *Id.* at 6-7.

<sup>59</sup> Assignment Petition at 3.

<sup>60</sup> KAXT Opposition to Renewal Petition, Decl. of Charles A. Tweedy at 2, 4-5 ("Tweedy Decl.").

<sup>61</sup> Tweedy Decl. at 5.

<sup>62</sup> We note that our ability to conduct the requested review pursuant to section 1.115 of the Commission's rules is complicated by the AFR's failure to comport with that section of our rules. The AFR does not state the questions presented for review concisely and plainly. See 47 CFR § 1.115(b)(1). Rather, the AFR identifies four sets of what the Kapurs characterize to be troubling "facts," pulled from the entire record underlying all three prior challenges (and their supplements), to support its proposition that Commission review and reconsideration are warranted. Only

(continued....)

**A. The OTA Counsel's Letter**

15. In their AFR, the Kapurs state that their “original pleading in this case focused on whether the assignor possessed the legal authority to sell the Station, but OTA’s decision to send the [letter from its counsel demanding that they cease their opposition to the Assignment Application] brought the qualifications of OTA and its principals into play.”<sup>63</sup> Unable to plausibly attack Trumbly’s authority any longer, they pivoted to claim that the letter from OTA’s counsel, which threatened that, if they continued their delaying efforts after the arbitrator’s determination in favor of KAXT, OTA would exercise its legal remedies against them, somehow raised an issue as to whether OTA was qualified to be the Commission licensee of the Station. We agree with the Division’s conclusion that “all applicants may enforce their contractual rights by pursuing all available legal relief without impermissibly infringing upon petitioners’ rights” and that “licensees have the right to pursue any legal remedies that they may have at their disposal, and that an applicant’s advising a petitioner that it might file does not reflect adversely on the licensee’s character qualifications.”<sup>64</sup> The Kapurs’ contention was totally without merit and we affirm the Division’s rejection of it.

**B. OTA’s Failure to Disclose the Kapurs’ Character Allegations Arising From the Counsel’s Letter Against It in Its Applications**

16. In their AFR, the Kapurs continue to claim that OTA lacks the requisite qualifications to become a Commission licensee because it failed to amend the Renewal Application and its other filings to report the character allegations that the Kapurs had made against it.<sup>65</sup> In the *Reconsideration MO&O*, the Division admonished OTA for its failure to have amended the Renewal Application to report the Kapurs’ character allegations. We disagree with this determination by the Division. As the Commission held in *Greater Muskegon Broadcasters, Inc.*, where the allegations of character consist only of allegations against an applicant, “[u]ntil such allegations are determined to have merit and are designated for hearing, no ‘unresolved’ issue is pending ‘against’ the applicant, so there is nothing to report.”<sup>66</sup> As noted herein, the Division has rejected as meritless each such allegation made by the Kapurs, determinations with which we agree and affirm. Because the allegations were not deemed to have merit and designated for hearing, they are not “issues [that] were left unresolved.” For the same reason, as the Bureau itself has concluded, mere allegations raised with respect to character in a pending application proceeding do not rise to the level of “issues,”<sup>67</sup> a term intended to refer to the issues in a hearing designation order.<sup>68</sup> In any

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in the context of its discussion of these facts does the AFR identify findings of facts or conclusions of law drawn from the three prior Division decisions. Nevertheless, in the interest of administrative finality, we examine below each of these sets of alleged “facts” to the extent that they raise a colorable challenge to a finding of fact or conclusion of law set forth in the *Further Reconsideration MO&O*.

<sup>63</sup> AFR at 5.

<sup>64</sup> *MO&O*, 29 FCC Rcd at 8269.

<sup>65</sup> AFR at 4-5. The renewal application form required OTA to certify that “neither the licensee nor any party to the application has or has had any interest in, or connection with: a. any broadcast application in any proceeding where character issues were left unresolved or were resolved adversely against the applicant or any party to the application; or b. any pending broadcast application in which character issues have been raised.” FCC Form 303-S, Section II, Question 2.

<sup>66</sup> *Greater Muskegon Broadcasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 15464, 15472 (1996); We note that the Commission is not bound by prior staff decisions to the extent they are inconsistent with this decision, *see, e.g., Nexstar Broad., Inc. and Mission Broad., Inc.*, Letter Order, 23 FCC Rcd 3528, 3537-38 (MB 2008). *Comcast Corp. v. FCC*, 526 F.3d 763, 769-70 (D.C. Cir. 2008) (“[A]n agency is not bound by the actions of its staff if the agency has not endorsed those actions.”).

<sup>67</sup> *Coosa Valley News, Inc.*, Letter Order, 23 FCC Rcd 9146, 9149 (MB 2008) (citing *Greater Muskegon*, 11 FCC Rcd at 15472).



event, as a separate and independent basis for rejecting these claims, we conclude that, in the absence of evidence indicating intent to deceive, which is lacking here, the record does not present a substantial and material question of fact regarding OTA's character qualifications.<sup>69</sup>

### C. The Todd Lawyer Insulation

17. We also affirm the Division's rejection of the Kapurs' assertion that the Division fabricated a new test of "unknowability" in dismissing, as untimely raised, their claim that OTA certified falsely in the Assignment Application (and other applications) that no party to that filing was a felon based on the OTA's alleged failure to insulate Todd Lawyer in the OTA organizational documents.<sup>70</sup> The Kapurs' attempt to construct a basis for reconsideration predicated solely on the Division's isolated use of the term "unknowable" is unpersuasive; the context and content of the Division's analysis reveals that this term was merely a short-handed reference to the standard for review in section 1.106(c), which, as noted above, states that a petition for reconsideration will be entertained where "[t]he petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity."<sup>71</sup>

18. Based on the record before us and the application of the appropriate standard for reconsideration, we affirm the Division's conclusion that the Kapurs failed to demonstrate that the facts surrounding Todd Lawyer's felony conviction and insulation from OTA in 2013 were unknown to the Kapurs until after their last opportunity to present them to the Commission, and that they could not, through the exercise of ordinary diligence, have learned of those facts in question prior to such opportunity. Failure of either prong of the section 1.106(c) test would be fatal to the Kapurs' attempt to raise this argument on further reconsideration, and they have failed both. First, as the Division noted in the *Further Reconsideration MO&O*, the Kapurs have failed to indicate how and when they first learned of the conviction -- whether through the DOJ press release, the multiple insulation filings that OTA had submitted to the Commission disclosing the matter as early as March 2013, or by other means. Rather, they cite to these OTA insulation documents, which have been publicly available throughout the proceeding, but do not identify, including in the AFR or Reply, when, how, or who first became aware of these documents, or the legal basis of their apparent position that a petitioner is not required to do make such a showing.<sup>72</sup> The Commission has relied on the lack of specific date of petitioner discovery as a basis for rejecting similar newly-raised arguments on reconsideration,<sup>73</sup> as the Division appropriately did here.

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<sup>68</sup> See *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1224-25 (1986), *subsequent hist. omitted* (discussing character issues designated for hearing); 47 CFR § 1.221(a)(2) (order designating a matter for hearing includes a "statement as to . . . the issues upon which the application will be heard"). Thus, this question permits the Commission to condition the grant of an application on the outcome of a proceeding in which issues have been designated for hearing.

<sup>69</sup> *Reconsideration MO&O*, 30 FCC Rcd at 2697. All of the allegations at issue are a matter of public record on file with the Commission, and in such a circumstance there is no logical basis to infer a motive to deceive. *Greater Muskegon*, 11 FCC Rcd at 15472.

<sup>70</sup> See AFR at 7.

<sup>71</sup> 47 CFR § 1.106(b)(2)(ii), as incorporated in 47 CFR § 1.106(c)(1).

<sup>72</sup> See AFR at 8.

<sup>73</sup> See, e.g., *Wireless Properties of Virginia, Inc.*, Order on Reconsideration, 23 FCC Rcd 7466, 7471 (WTB 2008) (rejecting the presentation of new facts pursuant to section 1.106(c) because "it is unclear . . . on what specific date such new facts were discovered by Havens"); *Dennis J. Kelly, Esq.*, Letter Order, 23 FCC Rcd 4786, 4788 (MB 2008) (dismissing a petition for reconsideration of a denial of a request to extend a construction permit based on alleged lack of site availability because, at least in part, petitioner "presents no information identifying when she learned of the site loss . . .") (MB 2008).

19. Regardless of when and how the Kapurs actually first knew about Todd Lawyer's conviction and OTA's attempt to insulate him, exercise of ordinary diligence would have revealed these facts prior to their filing of the Assignment Petition, long before they filed their Further Reconsideration in which they first made the argument. As the Division has already explained, at the time of the Kapurs' submission of the first of their multiple pleadings in this proceeding, the Commission's public files for several OTA stations contained copies of the Insulation Letter that the Kapurs had appended to their Supplemental Petition.<sup>74</sup> In fact, the Kapurs acknowledged in their Petition for Further Reconsideration that examination of the Commission's publicly-available files was all that was necessary for them to learn of the circumstances surrounding Mr. Lawyer's felony conviction and OTA's non-disclosure.<sup>75</sup> They argue in the AFR that ordinary diligence would not have revealed these facts because OTA concealed them; the Kapurs "had encountered no trade press about the felony case"; and Lawyer's plea deal was an obscure proceeding that made little news.<sup>76</sup> While we agree with the Kapurs that they would not necessarily have learned of Lawyer's circumstances following the simple issuance of the news release by the US DOJ, they fail to acknowledge what the exercise of ordinary diligence would entail – routine review of the Commission's files. In short, the Kapurs have failed to demonstrate that they "could not through the exercise of ordinary diligence, . . . [have] learned of the facts and arguments in question. . . ."<sup>77</sup> Moreover, as a separate and independent basis for our rejection of this argument, given OTA's multiple filings of the Insulation Letter, we see no attempt by OTA to conceal the facts here, which would be an essential predicate for any showing of misrepresentation.<sup>78</sup>

#### **D. OTA's Purported Collusion with KAXT**

20. Finally, regarding the Kapurs' remaining argument,<sup>79</sup> we agree with the Division that any cooperation between OTA and the KAXT in the ongoing private litigation is immaterial to our consideration of the applications seeking to renew the Station's license and to assign it to OTA.<sup>80</sup> Given OTA's active participation before the Commission through the filing of multiple pleadings responsive to the Kapurs' repeated attacks on its character and on the proposed sale of the Station, its active

<sup>74</sup> *Further Reconsideration MO&O* at 14109 ("Specifically, in their Further Reconsideration Petition, the Petitioners cite Lawyer's plea of guilty on February 19, 2013, and an "Insulation Letter" dated February 8, 2013, that various OTA broadcasting subsidiaries filed with regard to other stations, such as a March 11, 2013, filing made by OTA station WEBR-CD.") (citations omitted).

<sup>75</sup> Kapurs Petition for Further Reconsideration at 10 ("Until release of the [Diya TV] Decision, OTA was on the verge of pulling a 'fast one,' feeding the FCC a 'story' that is demonstrably untrue, and filing and refusing to amend applications containing false certification. But the Yew decision [in the Diya TV proceeding] and a review of FCC files make clear that OTA lacks the character qualifications to hold the KAXT-CD license.") (emphasis added).

<sup>76</sup> AFR at 9 (citing News Release, U.S. Attorney's Office, Eastern District of Virginia, "Brokerage Executive Pleads Guilty in Hotel Flipping Scheme" (Feb. 19, 2013) (not mentioning Lawyer until the fourth paragraph)); Kapurs Reply at 6 n. 10 ("The Commission should reject out of hand OTA's absurd suggestion . . . that San Francisco-based Petitioners' 'ordinary diligence' should have let them to unearth a reference to Lawyer buried in the fourth paragraph of a federal prosecutor's obscure February 19, 2013 news release in the Eastern District of Virginia that made no mention of the fact that Lawyer was the cofounder and CEO of OTA. Omniscience is not the test.")

<sup>77</sup> 47 CFR 1.106(b)(2)(ii).

<sup>78</sup> *Fox River Broadcasting, Inc.*, Memorandum Opinion and Order, 93 FCC 2d 127, 129 (1983) ("The Commission has repeatedly held that the *sine qua non* of misrepresentation or lack of candor is intent to deceive the Commission, and has declined to infer intent to deceive the Commission when information is elsewhere disclosed or available in its records.")

<sup>79</sup> See AFR at 12-15.

<sup>80</sup> *Further Reconsideration MO&O* at 14108. See, e.g., 47 CFR § 1.17(a)(1) (no person subject to the rule shall "in any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading.").

participation and interest has been clear and the Kapurs' contention that it has somehow been clandestine is baseless. Indeed, given their common interest in closing the sale of the Station despite the Kapurs' extended efforts at delay, OTA's coordination with KAXT, the proposed seller and fellow target in this proceeding, was both open and reasonable and in accordance with the parties' obligations under the APA. The Kapurs allege no finding of fraud by OTA in any of their myriad of lawsuits, and the allegation that the actions of OTA and KAXT indicate a broader "concealment effort" are vague, conclusory and without factual basis.

#### **IV. ORDERING CLAUSES**

21. **ACCORDINGLY, IT IS ORDERED** That, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and sections 1.115(c) and (g) of the Commission's rules, 47 CFR § 1.115 (c),(g), the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary