

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

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

MEMORANDUM OPINION AND ORDER

Adopted: January 21, 2020

Released: January 22, 2020

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration an Application for Review (2018 AFR) filed by Nalini Kapur, Rishi Kapur, and Ravi Kapur (the Kapurs) in the above-referenced proceedings.1 The Kapurs are seeking review of a decision by the Video Division (the Division) of the Media Bureau (the Bureau)2 rejecting, on delegated authority, the Kapurs' Petition for Reconsideration (2017 Recon Petition)3 of the Commission's Memorandum Opinion and Order, released November 3, 2017 (2017 Commission MO&O), which denied the Kapurs' first Application for Review of multiple staff decisions

1 Application for Review of Nalini Kapur, Rishi Kapur, and Ravi Kapur, File Nos. BALDTA-20130211ACT & BRDTA-20140731ANH (filed Oct. 18, 2018) (2018 AFR). OTA filed an Opposition to the AFR on November 2, 2018 (2018 AFR Opposition), and the Kapurs filed a Reply on November 15, 2018 (2018 AFR 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, 33 FCC Rcd 8760 (MB 2018) (2018 Division MO&O).

3 Petition for Reconsideration of Nalini Kapur, Rishi Kapur, and Ravi Kapur, File Nos. BALDTA-20130211ACT & BRDTA-20140731ANH (filed Dec. 4, 2017) (2017 Recon Petition). OTA filed an Opposition on December 18, 2017 (2017 Recon Opposition), and the Kapurs filed a Reply on December 28, 2017 (2017 Recon Reply).

that relate to the sale of station KAXT-CD, San Francisco-San Jose, California (KAXT), to OTA Broadcasting (SFO), LLC (OTA) and the renewal of KAXT's license.⁴ We deny the 2018 AFR.

II. BACKGROUND

2. The history of this dispute is well-documented, and we decline to restate it here.⁵ In relevant part, these issues stem from the Kapurs' unsuccessful challenge to the grant of the original assignment of KAXT's license from KAXT, LLC—in which the Kapurs were minority interest holders—to OTA in 2014.⁶ The Division also renewed KAXT's license over the Kapurs' objection.⁷ In several subsequent decisions, the Division and the full Commission have repeatedly rejected the Kapurs' challenges.

3. On January 18, 2017, in a proceeding separate from and unrelated to the assignment and renewal dockets, the Bureau entered into a consent decree with OTA to resolve an investigation into OTA's political file practices.⁸ In the order adopting the consent decree, the Bureau terminated its investigation, while OTA agreed to pay \$32,000 and to implement a compliance plan to help ensure future compliance with the political file disclosure requirements.⁹ In the *2017 Consent Decree*, OTA admitted to certain violations, which could not be used against OTA by the Commission in any other proceedings “in the absence of new material evidence.”¹⁰

4. The *2018 Division MO&O* dismissed the Kapurs' request for reconsideration of the *2017 Commission MO&O*. The 2017 Recon Petition relied primarily on “new material evidence” that, according to the Kapurs, confirmed OTA's lack of character qualifications. Specifically, the Kapurs provided evidence of additional public file violations during the investigation period that were not mentioned in the *2017 Consent Decree*.¹¹ The Kapurs asserted that this constituted “new material evidence” that would allow the Commission to use OTA's admissions against it in a hearing on OTA's fitness to be a licensee.¹² The Kapurs also raised objections to various findings in the *2017 Commission MO&O*. In opposition, OTA asserted that the Kapurs had failed to demonstrate that reconsideration was warranted and argued that the Kapurs' conduct before the Commission constituted abuse of process.¹³

⁴ *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, 32 FCC Rcd 9638 (2017) (*2017 Commission MO&O*).

⁵ *See id.* at 9639-9642, paras. 2-9 (recounting prior decisions and underlying facts).

⁶ *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). Those seeking additional background can consult recent decisions in this proceeding. *See generally 2018 Division MO&O*, 33 FCC Rcd 8760; *2017 Commission MO&O*, 32 FCC Rcd 9638.

⁷ *See 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, 2691, para. 1 (MB 2015).

⁸ *Investigation into the Political File Practices of OTA Broadcasting (SFO), LLC*, Order and Consent Decree, 32 FCC Rcd 795 (MB 2017) (*2017 Consent Decree*).

⁹ *Id.* at 795, para. 2.

¹⁰ *Id.* at 799-800, paras. 10-11.

¹¹ 2017 Recon Petition at 7-10, Exhibit A; *see also id.* at 3 (noting that the evidence was previously submitted to the Commission on July 12, 2017, in the Incentive Auction context and referenced in this proceeding on July 21, 2017, in a “Statement for the Record”).

¹² *Id.* at 10.

¹³ *See generally 2017 Recon Opposition.*

The Kapurs, in reply, rejected the claim that they were engaging in abuse of process and claimed that OTA had failed to address the substance of the 2017 Recon Petition.¹⁴ Upon review, the Division dismissed the 2017 Recon Petition, finding that it failed to warrant review by the full Commission, because it raised arguments previously considered and rejected by the Commission, or pertained to matters resolved by the *2017 Consent Decree*.¹⁵

5. In the 2018 AFR, the Kapurs ask us not only to reverse the *2018 Division MO&O*, but also to rescind the initial assignment to OTA and set the matter for a hearing.¹⁶ Specifically, the Kapurs assert that the Division erred in rejecting the purported “new material evidence” of additional political file violations because the Bureau had no knowledge of those violations when it entered into the *2017 Consent Decree*.¹⁷ The Kapurs also contend that the *2018 Division MO&O* erred in two other respects: (1) by rejecting the argument that insulation cannot be effected by letter agreement;¹⁸ and (2) by concluding that the Kapurs failed “to demonstrate how a local ballot on affordable housing would be a national legislative issue of public importance” that would constitute a “political matter of national importance.”¹⁹ The Kapurs’ ultimate goal is that KAXT, LLC, be reinstated as the station licensee.²⁰ OTA, in opposition, asks us to affirm the *2018 Division MO&O* and to impose sanctions on the Kapurs for abuse of process.²¹ In reply, the Kapurs reject OTA’s arguments and assert that OTA should instead be sanctioned.²²

III. DISCUSSION

6. *Issues previously rejected by the Commission.* In their 2017 Recon Petition and again in their 2018 AFR, the Kapurs re-assert numerous arguments, including that: (1) OTA threatened the Kapurs with “punishing litigation” in a letter from OTA’s counsel unless they withdrew their pleadings; (2) OTA has continued to omit pending character allegations in its applications even after a March 2015 admonishment by staff (that was subsequently overturned by the Commission); (3) OTA actively collaborated with the controlling members of KAXT, LLC, against the Kapurs during arbitration of a contractual dispute; and (4) OTA misrepresented to the Commission by not certifying “Yes” as to

¹⁴ See generally 2017 Recon Reply.

¹⁵ See generally *2018 Division MO&O*, 33 FCC Rcd 8760.

¹⁶ 2018 AFR at 10.

¹⁷ *Id.* at 4-7,

¹⁸ *Id.* at 7-8 (citing *2018 Division MO&O*, 33 FCC Rcd at 8763, para. 8 n.26).

¹⁹ *Id.* at 8-9 (citing *2018 Division MO&O*, 33 FCC Rcd at 8764, para. 9 n.32).

²⁰ *Id.* We note, however, that OTA is not currently the licensee of KAXT. The Bureau recently approved the assignment of the station from OTA to TV-49, Inc. (TV-49)—again over the Kapurs’ objection. See *OTA Broadcasting (SFO), LLC (Assignor) and TV-49, Inc. (Assignee), Application for Consent to Assign the License of Station KAXT-CD, San Francisco-San Jose, CA, Application for Consent to Assignment of Station KTLN-TV, Novato, CA*, Memorandum Opinion and Order, 33 FCC Rcd 8765 (MB 2018). We affirm the Bureau’s decision today concurrent with our denial here of the Kapurs’ 2018 AFR. See *OTA Broadcasting (SFO), LLC (Assignor) and TV-49, Inc. (Assignee), Application for Consent to Assign the License of Station KAXT-CD, San Francisco-San Jose, CA, Application for Consent to Assignment of Station KTLN-TV, Novato, CA*, Memorandum Opinion and Order, FCC 20-1 (rel. Jan. 22, 2020). OTA and TV-49 consummated the transaction on April 17, 2019.

²¹ 2018 AFR Opposition at 5-12. OTA also raises a procedural objection to the 2018 AFR, asserting that the Kapurs could have sought judicial review of the *2017 Commission MO&O* or supplemented their initial Application for Review to include the “new” evidence. *Id.* at 4-5; see also 2018 Recon Reply at 3-9 (rejecting OTA’s procedural argument). We decline to address this issue, as it now moot.

²² 2018 AFR Reply at 2-10.

whether a felon is a party to the assignor's portion of the Application because the felon was not properly insulated.²³ These issues have been thoroughly considered in this proceeding and plainly do not provide cause for reconsideration.²⁴ The Commission has already addressed these issues in detail, and we decline to do so again here.²⁵

7. *Issues not previously addressed by the Commission.* In addition to restating arguments that had already been considered and rejected by the Commission, the Kapurs argue that the Commission should initiate a hearing on OTA's character qualifications as a result of alleged public file violations not addressed in the *2017 Consent Decree*. Specifically, the 2017 Recon Petition attempted to use OTA's admissions in the *2017 Consent Decree* as justification for designating the applications at issue in this proceeding for hearing on OTA's basic qualifications—something the *2017 Consent Decree* prohibits absent “new material evidence.”²⁶

8. We have reviewed the evidence provided by the Kapurs and conclude that, even when considered in conjunction with the admitted violations set forth in the Consent Decree, it does not provide a sufficient basis to call into question OTA's basic qualifications.²⁷ In general, the evidence submitted by the Kapurs confirmed what the Commission already knew—OTA's maintenance of its political file during the investigation period failed to comply with Commission rules.²⁸ We find no indication, however, that OTA was intentionally hiding these additional violations from the Commission.²⁹ In the

²³ *2018 Division MO&O*, 33 FCC Rcd at 8761, para. 2 (citing 2017 Recon Petition at 3-12) (further citations omitted); 2018 AFR at 3 n.7 and 7-8.

²⁴ *2018 Division MO&O*, 33 FCC Rcd at 8762-63, para. 8; *2017 Commission MO&O*, 32 FCC Rcd at 9644-48, paras. 14-20. We affirm the *2018 Division MO&O* to the extent that it determined that these issues did not warrant reconsideration under 47 CFR § 1.106(p). We need not decide whether, due to the nature of the letter agreement at issue here, the FCC Form 314 instructions required OTA to answer “No” in response to the certification that no “party to the application” is a felon and to include an exhibit setting forth its reasons for not treating the felon as a party to the application. *Cf. 2018 Division MO&O*, 33 FCC Rcd at 8762-63, para. 8 n.26. The Commission has previously explained that OTA did not conceal any facts on this issue, which would be an essential predicate for any showing of misrepresentation relevant to the question of OTA's character qualifications. *2017 Commission MO&O*, 32 FCC Rcd at 9647, para. 19.

²⁵ *See generally 2017 Commission MO&O*, 32 FCC Rcd 9638.

²⁶ 2018 AFR at 4-7; 2017 Recon Petition at 7-10; *2017 Consent Decree*, 32 FCC Rcd at 800, para. 10.

²⁷ We need not decide whether the advertisement regarding the local ballot on affordable housing was a “political matter of national importance” or a “national legislative issue of public importance” under Section 315(e) or otherwise required to be disclosed in the political file. *Cf. 2018 Division MO&O*, 33 FCC Rcd at 8764, para. 9 n.32. Even assuming a violation, we do not find it would call into question OTA's basic character qualifications for the reasons discussed herein.

²⁸ *See generally 2017 Consent Decree*, 32 FCC Rcd 795. To the extent the Bureau determined that the new political file violations first uncovered by the Kapurs in July 2017 were already “captured” by the *2017 Consent Decree*, we reject that view. *Cf. 2018 Division MO&O*, 33 FCC Rcd at 8764, para. 9.

²⁹ *See 2018 AFR* at 4-7; 2017 Recon Petition at 7-10. OTA has explained that the advertisements at issue were aired on two multicast channels that were programmed under time brokerage agreements and the programmers did not disclose to KAXT the airing of these advertisements, in “express violation of the terms of the time brokerage agreements.” *See Reply of Nalini Kapur, Rishi Kapur, and Ravi Kapur to Opposition to Petition for Reconsideration of the Kapurs* (filed Dec. 28, 2017), Exhibit 1 (attaching OTA's October 2017 Compliance Report). While this is no way excuses the licensee's ultimate responsibility for a rule violation, there is no evidence that KAXT was aware of these violations at the time of the *2017 Consent Decree* and chose to conceal them from the Bureau. In the 2018 AFR, the Kapurs express grave concerns about undermining the integrity of the consent decree process. 2018 AFR at 4-7. These concerns are unfounded. While it should go without saying, efforts to conceal violations or otherwise mislead Commission investigators will not be tolerated. Nothing in our decision here stands for the contrary.

absence of any actual evidence of misrepresentation, lack of candor, or any other aggravating conduct that speaks more directly to OTA's character,³⁰ we agree with the staff that there were no substantial and material questions of fact as to OTA's basic qualifications.³¹

9. *OTA's request for sanctions.* The Commission—at both the staff and Commission level—has given the Kapurs a full and fair opportunity to be heard. While we decline to impose any sanctions at this time, we remind all parties before the Commission that our processes and procedures should not be abused in an effort to resolve private contractual disputes.

IV. ORDERING CLAUSE

10. **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 section 1.115(g) of the Commission's rules, 47 CFR § 1.115(g), the Application for Review **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁰ We reject the Kapurs' continued efforts to use conduct by OTA as a licensee—alleged and actual—to establish that OTA lacked the character and fitness to be a licensee at the time the Commission approved the sale of KAXT to OTA (this finding would be necessary for us to grant the Kapurs' ultimate request for relief, i.e., to reinstate KAXT, LLC, as the licensee of KAXT). The fact that an entity may subsequently fail in its obligations as a licensee, such that it no longer can remain a licensee, in no way invalidates the Commission's earlier finding that the entity was fit to be a licensee at the time a transaction was approved (or a license renewed). The Kapurs provide no support for their theory that OTA's conduct as a licensee is grounds to rescind the grant of the assignment of KAXT. *See, e.g., Entercom Sacramento License, LLC*, Memorandum Opinion and Order, 33 FCC Rcd 6615, 6618, para. 9 n. 27 (2018) (rejecting argument that misconduct at station years after assignment of its license is grounds to return license to previous licensee); *cf. Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1107 (D.C. Cir. 2009) (“[W]e judge the reasonableness of an agency's decision on the basis of the record before the agency at the time it made its decision”). As such, to the extent it would ever be relevant to a Commission proceeding regarding character, the *2017 Consent Decree* would be relevant to an evaluation of OTA's continuing fitness to be a licensee, not to a re-evaluation of its acquisition of KAXT or the 2015 license renewal.

³¹ We also uphold the Division's finding that the alleged separate violation of section 73.3526(e)(10) failed to raise a substantial and material question of fact as to character. *2018 Division MO&O*, 33 FCC Rcd at 8764, para. 9; *see also* 47 CFR § 73.3526(e)(10). Based on the facts presented here, we find no basis to initiate a hearing to assess OTA's character qualifications based on the public file rule violations alleged here. *See, e.g., R & L Broadcasters*, Memorandum Opinion and Order, 7 FCC Rcd 5551, 5554, para. 16 (1992) (“The Commission's policy is not to designate a potentially disqualifying public file issue for hearing when there is no evidence of intentional misconduct.”).