

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

In the Matter of)	MM Docket No. 96-70
)	
UNDER HIS DIRECTION, INC.)	
)	
Order to Show Cause Why the)	
License for Station KUHD (AM))	
Port Neches, Texas Should)	
Not be Revoked)	

APPEARANCES

Mark A. Peterson on behalf of Under His Direction and Robert Zauner, Esq. on behalf of the Mass Media Bureau.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
EDWARD LUTON**

Issued: November 20, 1996

Released: November 22, 1996

I. Preliminary Statement

1. By Order to Show Cause and Hearing Designation Order, DA 96-466, released April 1, 1996 ("HDO"), the Commission ordered a show cause hearing to determine whether the license for AM Station KUHD, Port Neches, Texas should be revoked. The HDO specified the following issues:

- (1) To determine whether Under His Direction, Inc. has the capability and intent to expeditiously resume the broadcast operations of KUHD(AM), consistent with the Commission's Rules.
- (2) To determine whether Under His Direction, Inc. has violated Sections 73.1740 and 73.1750 of the Commission's Rules.
- (3) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Under His Direction, Inc. is qualified to be and remain the licensee of KUHD(AM).

2. The HDO also specified that if it is determined that the record does not warrant an order revoking the license for the station, it shall be determined whether an order of forfeiture should be issued in an amount not to exceed \$250,000 for the willful and repeated violation of Section 73.561 and/or 73.150 of the Commissions Rules. A pre-hearing conference was held on May 8, 1996, and the hearing took place on July 24, 1996.

II. FINDINGS OF FACT

3. UHD acquired the assets of the station and the KUHD license from the Church of the Christian Crusade ("CCC") on September 9, 1993. (UHD Ex. 1, p.1.) Part of the consideration to CCC from UHD was a promissory note, secured by the assets of the station, in the amount of \$60,000. (UHD Ex. 1, p.1, Attachment D).

4. Because of financial difficulties, UHD took the station dark on August 18, 1994. (Tr. 71.) UHD filed a request for special temporary authority ("STA") to remain dark on January 6, 1995. (UHD Ex. 1, p.1, Attachment A.) UHD's request stated that "KUHD is presently off the air due to extreme financial hardship.... We are presently seeking alternative sources of financing and are working with a church organization to possibly help with the monthly support." (UHD Ex. 1, Attachment A.) This first request for STA was initially granted by the Commission on February 25, 1995. (UHD Ex.1, p.1.) That grant was superseded by a grant letter dated April 25, 1995 which set an expiration date of July 25, 1995. (*Id.*)

5. On February 28, 1995, the assets of the station located at its tower site, including the station's tower and transmitter, were seized by Janet Chance, the owner of KUHD's tower site. (Tr. 72; UHD Ex. 1, p.1). Ms. Chance then purchased those assets herself at a public auction on March 8, 1995. (Tr. 72-73; UHD Ex.1, p.1).

6. UHD was unsuccessful in securing funds on its own to return the station to the air. (UHD Ex.1, p.1). Shortly after the tower site foreclosure, UHD entered into negotiations with CCC. These negotiations culminated in a document entitled Conveyance in Lieu of Foreclosure ("Conveyance Agreement") between UHD and CCC, which was prepared by CCC and CCC's attorney. (Tr. 76. UHD Ex.1, p.1). Mark A. Peterson, president of UHD, signed the Conveyance Agreement on May 26, 1995. (UHD Ex. 1, Attachment D.) The Conveyance Agreement called for UHD to assign the KUHD license back to CCC in consideration of CCC's forgiveness of the debt owed to it by UHD. (UHD Ex. 1, p.1). CCC informed UHD that it had negotiated an agreement with Ms. Chance to accept conveyance of the station assets at the transmitter site in consideration of payment to Ms. Chance of the back rent owed her by UHD. CCC also told UHD that it intended to enter into a similar agreement with McKee Towers, the studio site owner. Now, UHD believed CCC would honor the terms of the Conveyance Agreement and return KUHD to the air. (UHD Ex. 1, pp. 1-2).

7. UHD filed its first request for extension of STA on July 25, 1995. (UHD Ex. 1, Attachment E.) The request stated that UHD had "obtained an agreement with the mortgage holder of the assets of KUHD(AM) and will be consummating our agreement very shortly." The request further stated that a transfer of control application should follow within thirty days. The FCC granted the extension of STA on August 2, 1995, for a six month period, to expire February 2, 1996. (UHD Ex. 1, p. 2, Attachment F.)

8. It was Peterson's understanding that the assignment application was to be prepared and filed by CCC at its expense. (Tr. 31.) Over the course of several conversations, J.P. Williams, CCC's business manager, told UHD that CCC was having trouble coming up with the funds and negotiating the terms necessary for it to use the transmitter and other equipment held by Ms. Chance. (Tr. 78.) CCC told UHD it did not want to file a license assignment application with the FCC until it had completed its negotiations and was prepared to return KUHD to the air. (UHD Ex. 1, p.2). It was Mr. Peterson's belief that CCC had the money to complete the transaction, but was probably posturing to get the best deal possible from Ms. Chance and McKee Towers. (Tr. 80-81.)

9. During this period UHD did consider canceling or withdrawing from the Conveyance Agreement because of CCC's failure to proceed. (Tr. 78.) However, UHD's legal counsel advised UHD that if it withdrew from the Conveyance Agreement, UHD would be "stuck with \$60,000 debt and lawsuits from everybody involved in the radio station assets." (Tr. 78-79.) In fact, Gil and Elroy Castro (who later organized Vision Latina, Inc.) contacted UHD about acquiring the Station, but Mr. Peterson advised them that UHD was obligated under its Conveyance Agreement with CCC and could not enter into an agreement with anyone else. (UHD Ex. 1, p.2; UHD Ex. 2, p.1).

10. Approximately one week before the first extension of STA was to expire, on or about January 28, 1996, CCC informed UHD that it had declined to execute the Conveyance Agreement and was no longer interested in receiving an assignment of the license. (UHD Ex. 1, p.2).

11. UHD's Mr. Peterson immediately contacted the FCC to explain the situation. (UHD Ex. 2, p. 2; Attachment G.) On January 30, 1996, he spoke with an attorney at the Commission who told him that if UHD wanted to obtain a further extension of time to remain silent, UHD would have to show 1) that it had an agreement with a new buyer and 2) that the new buyer would have the right to acquire or lease the KUHD studio and antenna sites. (Tr. 32, 46; UHD Ex. 2, p.2). Peterson now believed that UHD could not file for a second extension of the STA until after it had secured an agreement with a new buyer. Therefore, UHD contacted the Castros on January 31, 1996, and explained that the intended buyer had declined to proceed so that UHD was now free to enter an agreement with the Castros. (UHD Ex. 2, p.1). UHD also told the Castros that they would have to make suitable arrangements with the owners of the studio and transmitter sites (McKee Towers and Ms. Chance) before they would be allowed to acquire the station's license. (UHD Ex. 1, p.3; UHD Ex. 2, p.1). UHD indicated that it would assign the KUHD license to the Castros if they were successful in making these arrangements.

12. By the end of March 1996, the Castros had incorporated Vision and had reached agreements with both McKee Towers and Ms. Chance. (Tr. 40-41; UHD Ex. 1, p.3; UHD Ex. 2, p.1). Vision had also retained communications counsel to prepare a formal license assignment agreement, which reflected the terms already negotiated by Vision and UHD, and the assignment application. (UHD Ex. 1, p.3; UHD Ex. 2, p.1). This work was in progress when the HDO was released on April 1, 1996.

13. After considering the situation, Vision nevertheless decided to proceed with its effort to acquire the KUHD license and return the station to the air. (UHD Ex. 2, p.2). Vision therefore authorized its counsel to finalize the assignment agreement between UHD and Vision and to file the assignment application which was executed by both parties.

14. An application for FCC consent to assign the KUHD license from UHD to Vision was filed on May 24, 1996. The assignment application states that Vision has examined the station's equipment and found that equipment to be in good working order, and that Vision believes it can make the station operational within thirty days after the assignment application is granted.

15. Although they have not yet done so, UHD and Vision hope to enter into a time brokerage agreement. (UHD Ex. 1, p.3; UHD Ex. 2, p.2). They believe that such an agreement would enable UHD to recommence broadcast operations as soon as the FCC finds that UHD should retain its license. (UHD Ex. 1, p.3; UHD Ex. 2, p.2).

III. CONCLUSIONS OF LAW

16. The issues in this case seek to determine whether the licensee has the capability and intent to expeditiously resume the broadcast operations of KUHD(AM), and whether the licensee violated Section 73.1740 and 73.1750 of the Commission's Rules. The HDO placed the burden of proceeding and the burden of proof on the Mass Media Bureau.

17. The Bureau attacks the licensee's "intent" by claiming that the "record here reveals that UHD cannot be relied upon to return [the station] to the air." The Bureau's conclusion is based upon a simple recitation of facts which are not disputed: 1) in January 1995, UHD told the Commission that it expected to return KUHD(AM) to the air within 90 days; the station was not returned to the air within that time; 2) in a letter to the Commission dated July 26, 1995, UHD stated that an application for transfer of control of the station would be filed within 30 days; no transfer application was filed within that time. A more complete examination of these facts, however reflect some considerable effort by UHD to achieve its stated aim of returning the station to the air. The Bureau's conclusion that its brief recitation of scant facts shows "that UHD cannot be relied upon to return KUHD(AM) to the air" is, in the presiding officer's view, mistaken.

18. While the first STA was still in effect, the station assets at the tower site were seized and then purchased by the site owner. UHD then sought to return the station to CCC (from which UHD had bought the station) in exchange for the cancellation of debt incurred in acquiring the station. On May 26, 1995, Mr. Peterson, on behalf of UHD, executed a document (Conveyance Agreement) which he believed obligated UHD to follow through with the proposed arrangement. Peterson had reason to believe that that would be the actual result because CCC had negotiated a separate agreement with the transmitter site landlord for the conveyance of station assets at the site. CCC also expressed its intention to effect a similar arrangement with the studio

site owner. It seems clear that UHD had reason to believe that CCC would execute the Conveyance Agreement and the station would return to the air.

19. The Bureau suggests that UHD was dilatory in its dealings with CCC. UHD's last attempt to finalize arrangements with CCC occurred in late November or early December 1995. Thereafter, as the Bureau sees the matter, UHD's Mr. Peterson "sat back and did nothing" until he learned, toward the end of January 1996, that CCC was no longer interested. It was then that Peterson contacted the Commission for help. UHD did not seek a further STA extension, and the station has been off the air without authority since February 2, 1996.

20. It is true that the assignment application was not filed as promised. However, that is because, as Peterson understood the proposed arrangement with CCC, the assignment application was to be prepared and filed by CCC and not by UHD. In none of this is there a reasonable indication that Mr. Peterson and UHD "sat back and did nothing." As soon as he learned that CCC was no longer interested in the proposed deal, Peterson sought help, first at the Commission, and then from the Castros. This resulted in the situation as it exists today: by the end of March, 1996, Vision Latina had reached agreement with the transmitter site landlord and the studio site landlord, and had also reached an agreement with UHD to acquire the station assets and the KUHD(AM) license. The license assignment application was filed at the Commission on May 24, 1996.

21. The STA permitting the station to remain silent expired on February 2, 1996. At the time the HDO in this proceeding was issued, the station had been silent without authorization for fifty-six days. This was in violation of Section 73.1740 of the Commission's Rules.¹ In Blue Ribbon Broadcasting, Inc., 90 F.C.C. 2d 1023 (Rev. Bd. 1982), the Commission's Review Board viewed certain technical violations of the Rules this way: "... the infractions mainly took place over a relatively short period of time ... and there is no evidence that the ... violations were accompanied by misrepresentation or concealment." The Board's assessment was that, "the violations were not sufficiently prolonged or aggravated to warrant license revocation." 90 F.C.C. 2d, at 1027. The rule violation in the present case does not warrant license revocation.²

22. According to UHD, it has "discussed" entering a time brokerage agreement with Vision Latina which "would enable UHD to recommence broadcast operations...." These

¹ UHD never intended to permanently discontinue the operations of the station so there has been no violation of Section 73.1750.

² The violation extended over a period of only fifty-six days, and during that time efforts were made to return the station to the air: the would-be assignee, Vision Latina, commissioned the preparation of a formal license assignment agreement and the associated license application. Additionally, there is no suggestion of misrepresentation or concealment in connection with the rule violation.

mere discussions concerning an agreement which has not been struck do not, contrary to UHD's claim, constitute "a concrete plan to return KUHD to the air."

23. The license assignment application is presently on file with the Commission. In its proposed findings, the Mass Media Bureau indicates that the pending assignment application can give no hope to the licensee. The Bureau states:

"What UHD proposes is to transfer KUHD(AM) to Vision Latina in the hope that this company will return the station to the air. This, however, is a false hope. It is the Mass Media Bureau's policy not to approve the transfer of station's which are silent and that have been designated for hearing."


The reasons underlying the Bureau's "policy" are nowhere stated or explained and, on this record, the policy appears arbitrary. In any event, the Bureau's policy appears to have been changed by the Commission's recent determination in Southwestern Broadcasting Corporation, FCC 96-443, released November 15, 1996. There, the Bureau was instructed to expeditiously process a minor modification application, notwithstanding that the application had been filed post-designation. The Commission stated that "Although the Bureau has declined to process the application for Channel 282 C2 because it was filed post-designation, we are unable to discern a convincing basis for the Bureau's position...." There also appears to be no "convincing basis" for the Bureau's refusal to process the assignment application in the present case. The licensee has presented a reasonable plan to return the station to the air. Assuming favorable action on the assignment application, Vision Latina estimates that the station will be operational within thirty days thereafter.

IV. ULTIMATE CONCLUSIONS

24. The ultimate issue for decision is whether, on the basis of the evidence adduced at hearing, UHD's license to operate KUHD(AM) should be revoked. It is concluded that UHD, by way of its proposed license assignment to Vision Latina, Inc., has both the capability and the intent to expeditiously return KUHD(AM) to the air. UHD violated Section 73.1740 of the Commission's Rules, but the violation was of relatively brief duration and came at a time when the licensee was engaged in significant efforts to return the station to the air. Neither license revocation or the imposition of a forfeiture for this violation is warranted. The licensee did not violate Section 73.1750 of the Rules.

25. Accordingly, the Mass Media Bureau not having carried its burden of showing that the license for Station KUHD(AM), Port Neches, Texas, should be revoked, that license is not revoked.³

FEDERAL COMMUNICATIONS COMMISSION



Edward Luton
Administrative Law Judge

³ In the event exceptions are not filed within (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.