



Federal Communications Commission
Washington, D.C. 20554

February 20, 2015

In Reply Refer to:
1800B3-MM

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Ms. Vicki J. Barker
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In re: **Moab Public Radio, Inc.**
KZMU(FM), Moab, Utah
Facility ID No. 43314

K291AF, Castle Valley, Utah
Facility ID No. 86945

File Nos. BRED-20050527ANY
BRFT-20050527ANZ

Application for Renewal

Informal Objections

Dear Counsel and Objectors:

We have before us the above-referenced application ("Renewal Application") filed by Moab Public Radio, Inc. ("MPR") for renewal of the license of noncommercial educational ("NCE") FM Station KZMU(FM), Moab, Utah ("Station").¹ We also have before us: (1) an informal objection to the Renewal Application filed by Ms. Vicky J. Barker ("Barker"), on September 12, 2005, ("Barker Objection"); (2) an informal objection to the Renewal Application filed by Ms. Karla Prudent on January 6, 2006 ("Prudent

¹ The Renewal Application also includes FM Translator Station K291AF, Castle Valley, Utah. The translator renewal is uncontested. In light of our action herein, we will grant the translator license renewal application below.

Objection”);² and (3) associated pleadings.³ For the reasons set forth below, we deny in part and dismiss in part the informal objections and grant the Renewal Application, subject to one requirement.

Background. MPR filed four FCC Forms on May 27, 2005: (1) the Renewal Application;⁴ (2) its FCC Form 323-E Ownership Report (“Ownership Report”);⁵ (3) the FCC Form 396 Broadcast Equal Employment Opportunity Program Report (“EEO Report”);⁶ and (4) a *pro forma* FCC Form 316 transfer of control application requesting approval for a gradual change in over 50 percent of Board of Directors membership (“Transfer Application”).⁷

Barker filed her Objection on September 12, 2005, to highlight alleged violations, “discrepancies,” and “inaccuracies” in the filings listed above, and to “request an inquiry into other matters” that she believes demonstrate that the Station “is not operating in the public interest.”⁸ Specifically, she avers that: (1) the copy of the MPR Articles of Incorporation filed in May 2005 with the Ownership Report was not the current version of this document;⁹ (2) the Ownership Report should be corrected to accurately list each board member’s home address, rather than that of the Station or a post office box;¹⁰ (3) the Ownership Report chart of historical board membership shows that some members exceeded their allotted two-year term of service, a bylaws violation; (4) MPR was “involuntarily dissolved” in 1997, and therefore was not operating as a Utah-registered business from April 1, 1997, to November 11, 1998;¹¹ (5) certain board members do not meet the character qualifications and conflict of interest requirements set forth in MPR’s bylaws.¹² These include Mr. Dwayne Jackson (“Jackson”), who became a board member despite several complaints that indecent content was aired on his program;¹³ and

² Under 47 C.F.R. § 73.3516(e), petitions to deny the Renewal Application were due by September 1, 2005. Barker and Prudent’s filings do not meet the timeliness requirements for petitions to deny. Accordingly, we will consider them informal objections. *See* 47 C.F.R. § 73.3587.

³ MPR filed an Opposition to the Barker Objection on October 20, 2005 (“MPR October Opposition”), and an Opposition to the Prudent Objection on February 13, 2006 (“MPR February Opposition”). Ms. Barker filed a Reply to Opposition on December 13, 2005 (“Barker Reply”).

⁴ Renewal applications for stations in Utah were to be filed by June 1, 2005, and licenses expired October 1, 2005. We accepted the Renewal Application for filing May 31, 2005.

⁵ File No. BOA-20050527AFI (accepted for filing July 12, 2005; amended by File No. BOS-20050711AAC).

⁶ File No. B396-20050527AFO.

⁷ File No. BTCED-20050527AAO (accepted for filing May 31, 2005; granted Jun. 17, 2005).

⁸ Barker Objection at 1.

⁹ *Id.* at 1-3.

¹⁰ She also suggests that MPR correct the telephone number of the signatory, as it is currently that of the Station, not the individual. *Id.* at 3-4. Barker states that the inaccurate information was filed with the Renewal Application and with the Transfer Application. However, the Renewal Application does not contain this information, and the Transfer Application lists some board members’ addresses, but no telephone numbers. Because she stated that the board members’ information was submitted on May 27, 2005, we believe it most likely that Barker meant the Ownership Report, as it contains board members’ addresses and the telephone number of the signatory.

¹¹ Barker urges the Commission to “check ... and cross check with the state of Utah and explain” what happened. *Id.* at 3.

¹² Barker claims that MPR bylaws require board members to “display good judgment ... provide impartial and fair services to benefit the corporation” and refrain from being influenced by “relationships with other organizations or activities.” *Id.* at 5.

¹³ *Id.* at 5-6. Specifically, Barker alleges that: (1) board member Chris Simon’s media consulting business and board member Betsy Henderson’s stock in Sirius XM Holdings may compromise their impartiality and present a conflict

(6) MPR board members have violated MPR's personnel policies by "using their position to advance personal or professional interests" by taking a job, contract, or fee-for-service position themselves or recruiting from within their personal network without first offering it to the public.¹⁴

In its Opposition, MPR concedes that it failed to file the current Articles of Incorporation with the Commission due to a clerical error, but states that it corrected this oversight by filing the most recent version with the Commission on October 13, 2005.¹⁵ MPR adds that Question 7 of the Ownership Report, which prompts licensees to list board members' contact information, does not require each board member's "physical residential address."¹⁶ With respect to the Transfer Application, MPR states that it never purported to set forth the full picture of board membership turnover because it offered only a yearly, January 1, membership snapshot. MPR avers that this issue is moot because the grant of the Transfer Application is now final and not subject to appeal. MPR claims that the allegation regarding board members' character and actions consists of "speculation and hearsay," and states that, in any event, the Commission will not consider these board members' alleged conflicts of interest or the recruitment guidelines unless or until a finding of wrongdoing has been made against MPR by an agency or court of competent jurisdiction.¹⁷ MPR further states that the media interests held by Simon and Henderson are not cognizable under the local radio ownership rules.¹⁸ With respect to the First Complaint, MPR claims that it does not identify the particular song aired, the objector's name, or phone number and, therefore, fails for lack of specificity.¹⁹

In her December 13, 2005, Reply, Barker questions the veracity of MPR's claim that filing the old Articles of Incorporation was simply clerical error and urges the Commission to more thoroughly

of interest; (2) board member Tom Ossana has a felony record; and (3) board member Jackson has two conflicts of interest: (a) he has taken a loan from MPR counsel; and (b) he demonstrated poor judgment in his capacity as a DJ, reflected by several complaints of indecent content on his program. As evidence, Barker attaches a copy of an internal MPR listener complaint form in which an anonymous listener reported repeated use of offensive language in two songs played by Jackson on the Station's June 16, 2005, "Rock Garden" program ("First Complaint"). The complaint, as set forth on MPR's Listener Complaint Form, read: "Offensive language in lyrics – 'Mother fucker' and one song had so many fucks 'he' 'they' [sic] couldn't bleep them all out – 3 fucks came out loud and clear. This can shut the radio station down. I should not have to listen to this." Attachment to Barker Objection.

¹⁴ Barker acknowledges that MPR does not have to "abide by" EEO guidelines because it has fewer than five full-time employees; however, she argues that MPR should be held to a similar standard because it has internal policies that "promote equal opportunity ... and affirmative action guidelines." Barker Objection at 6. She also queries whether a certain staffer was authorized to sign MPR checks (MPR bylaws state that only board members can sign checks), and whether MPR has filed its unemployment taxes or established an unemployment insurance account. *Id.* at 7-8. We reject the check signing allegation on the grounds that it is speculative and outside Commission purview as an alleged bylaw violation, as discussed in detail below. The tax and insurance allegations are not only outside Commission purview as non-FCC matters that have never been adjudicated, but also are unsupported. We will not give these allegations further consideration.

¹⁵ MPR October Opposition at 6 and Exhibit 2 (copy of MPR Articles of Incorporation dated November 1998 and date-stamped by the Commission on October 13, 2005). MPR does not address Barker's claim that MPR was involuntarily dissolved in 1997.

¹⁶ *Id.* at 4 (citing identity theft concerns).

¹⁷ *Id.* at 3-4, citing *Policy Regarding Character Qualifications in Broadcast Licensing*, Memorandum Opinion and Order, 7 FCC Rcd 6564, 6566 (1992). Furthermore, MPR states that Ossana is "not a board member." MPR October Opposition at 4 n.6. The most recent ownership report for MPR does not list Ossana as a board member. See FCC File No. BOS-20131028ASA.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 6.

investigate the “business activities” that prompted MPR’s involuntary dissolution;²⁰ the complete history of board members (dating from MPR’s establishment); and whether the appropriate entities approved amendments to the Articles.²¹

Subsequently, Prudent, who identifies herself as the anonymous listener referenced in the Barker Objection, submitted her January 6, 2006, objection to the Renewal Application. She states that she wishes to provide the specifics that MPR claims the First Complaint lacked.²² To that end, Prudent states that, on the night in question, Jackson’s son, Eric, substituted for Jackson as host of “Rock Garden.” She reports that one song started with a shout, “Stand up you motherfuckers!” and in another, the word “fuck” was censored numerous times, except for three occurrences.²³ Prudent also describes a second complaint that she allegedly lodged with the Station’s program director (“Second Complaint”). It arises out of events that occurred on June 2, 2005, and involved allegedly indecent comments made by Jackson at the close of the “Rock Garden” program at approximately 9:00 p.m. According to Prudent, Jackson, who “sounded to me like he had been drinking” then stated to the host of the next program, “A woman called and said she was home masturbating to my show,” and that maybe he should “make [his] show a sex show.”²⁴ Lastly, she repeats Barker’s allegations with respect to Jackson’s conflict of interest as both a program host and a board member.²⁵

In MPR’s February 13, 2006, Opposition to the Prudent Objection, MPR challenges Prudent’s allegations as procedurally and substantively defective. It argues that when, as here, an objection is filed seven months after the allegedly indecent incident, the Commission cannot make an indecency determination because it cannot reconstruct the “context” on which such determinations depend, especially without a recording or transcript.²⁶ Also, MPR states that the Station took prompt remedial action to correct the incident that gave rise to the First Complaint.²⁷ MPR attaches the Declaration of Jeff Flanders, Station Manager, who states that the context of the utterances was a live version of a recorded unidentified Black Sabbath song, which Jackson allowed his son to play to celebrate his 20th birthday. Flanders states that Jackson was familiar only with the recorded version of the song, and that after the song aired he “apologized to listeners and took his son off the air.”²⁸ Flanders further states that he barred Jackson’s son from appearing on-air again without training from Flanders, and “issued a warning to Jackson.”²⁹ Although it does not specifically address the Second Complaint, MPR generally describes

²⁰ Barker Reply at 2.

²¹ Barker alleges that MPR should have filed changes to the Articles of Incorporation with the Utah State Division of Commerce and the Internal Revenue Service. *Id.* We reject the latter allegation as unsupported and address the former below.

²² Prudent Objection at 1.

²³ *Id.*, attaching a copy of the First Complaint.

²⁴ *Id.* at 3.

²⁵ *Id.* at 2-3.

²⁶ MPR February Opposition at 2, citing *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999 (2001). MPR states that no transcripts or recordings of the program exist. *Id.* at 3.

²⁷ *Id.* at 4 and attached complaint form.

²⁸ *Id.*, Declaration of Jeff Flanders.

²⁹ *Id.* MPR includes copy of the Listener Complaint Form, with Flanders’s comments in the “Action Taken” section.

Prudent's account of the events as subjective and unverifiable.³⁰ Finally, MPR stated that Jackson resigned from the Board effective January 30, 2006.³¹

Discussion. A petition to deny a renewal application (as well as an informal objection) must, pursuant to Section 309(d) of the Communications Act of 1934, as amended (the "Act"),³² provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(k) of the Act,³³ which governs our evaluation of an application for license renewal. Specifically, Section 309(k)(1) provides that we are to grant the renewal application if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations that, taken together, constitute a pattern of abuse.³⁴ If, however, the licensee fails to meet that standard, the Commission may deny the application, after notice and opportunity for a hearing under Section 309(d) of the Act, or grant the application "on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted."³⁵

Transfer Application. To the extent that Barker Objection complains that the Transfer Application contained incomplete information,³⁶ it must be considered a petition for reconsideration of that grant. The Commission granted that application on June 17, 2005, and issued public notice of the grant on June 27, 2005.³⁷ The Barker Objection, dated August 30, 2005, was not received by the Commission until September 12, 2005. Under Section 405 of the Act, a petition for reconsideration must be filed within 30 days of public notice of the grant.³⁸ The Commission cannot waive or extend this thirty day period, except in "extraordinary" circumstances.³⁹ Proceedings that have become final generally will not be reopened unless there has been fraud on the agency's processes or the result is manifestly unconscionable,⁴⁰ or to correct an inadvertent, ministerial error,⁴¹ states of affairs not raised, much less established, here. Here, the information, including the use of snapshot dates for describing board

³⁰ *Id.* at 3.

³¹ *Id.* at 2.

³² 47 U.S.C. § 309(d).

³³ *Id.*, § 309(k). See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh'g denied* (D.C. Cir. Sept. 10, 1993).

³⁴ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described in the text by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

³⁵ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

³⁶ File No. BTCED-20050527AAO.

³⁷ *Broadcast Actions*, Public Notice, Report No. 46014 (MB June 27, 2005).

³⁸ 47 U.S.C. § 405.

³⁹ *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976). Extraordinary circumstances include instances where a licensee's late-filing is substantially due to the Commission's failure to afford a party timely notice of the action for which reconsideration is sought.

⁴⁰ See, e.g., *Radio Para La Raza*, Memorandum Opinion and Order, 40 FCC 2d 1102, 1104 (1973).

⁴¹ See, e.g., *County of San Mateo, California*, Memorandum Opinion and Order, 16 FCC Rcd 16501, 16503 (2001).

members' tenures, provided in the Form 316 was adequate to support its grant, and there was no indication of fraud.⁴² Accordingly, we lack jurisdiction to reconsider grant of the Transfer Application.

Violations of Corporate Policies. Barker and Prudent's arguments about MPR's involuntary dissolution,⁴³ violations of MPR's bylaws,⁴⁴ recruitment and internal hiring practices⁴⁵ pertain to MPR's compliance with either Utah corporate law or MPR's own internal policies. Such complaints are beyond the scope of Commission review. The Commission has traditionally declined to consider issues of a licensee's compliance with the requirements of state corporate law where no challenge has been made in state court and the determination is one that is more appropriately a matter of state resolution.⁴⁶ Objectors have failed to demonstrate that any such challenge has been made in the instant case.

We also find meritless the remaining corporate policy claims, as MPR amended its ownership report to include a copy of the current Articles of Incorporation,⁴⁷ and Barker failed to provide any evidence that Ossana was convicted of a felony.⁴⁸

⁴² See, e.g., *WFCL, Nashville, TN*, Letter, 29 FCC Rcd 2869 (2014) (allegation of unreported transfer of control discounted where it failed to overcome licensee's claim that partial board turnover was incremental over time and did not break continuity of control); *The KBOO Foundation*, Letter, 26 FCC Rcd 13366 (MB 2011) (granting waiver of Section 73.3573(a)(1) where partial board turnover was incremental over time and did not break continuity of control).

⁴³ See, e.g., *New Bohemia Group, Inc.*, Letter, 24 FCC Rcd 1357 (MB 2009) (allegation that NCE FM station corporate applicant was not in good standing more appropriately a matter of state resolution where no challenge has been made in state court).

⁴⁴ Barker and Prudent's allegation that Simon, Henderson, and Jackson violated the MPR bylaws is outside the scope of our review here. See, e.g., *WOMA-LP, Lebanon, Pennsylvania*, Letter, 22 FCC Rcd 553 (2007) (finding meritless, in the renewal context, conflict of interest allegations involving a married couple who both served as board members and held operational positions at a low power FM broadcast station). MPR's characterization of Simon and Henderson's alleged conflicts of interest as a Section 73.3555 multiple ownership issue is misguided, because no violation of the rule would arise if the claims were true, and the claims are also moot because neither Simon nor Henderson is currently listed as a board member of MPR. See FCC File No. BOS-20131018ASA.

⁴⁵ Broadcast station licensees with fewer than five full-time employees are exempt from provisions of the Commission's EEO Rule which mandates general and specific EEO program requirements, including recruitment for vacancies and participation in EEO initiatives. See 47 C.F.R. § 73.2080(d) and, e.g., *Union County Broadcasting Co., Inc.*, Letter, 22 FCC Rcd 10285, 10290 (2007) (rejecting, *inter alia*, alleged violations of Commission EEO guidelines because licensee met Section 73.2080(d)'s criteria for exemption). In its EEO Report, MPR certified that it met its compliance obligations and employs fewer than five full-time employees. See B396-20050527AFO, Section I. We thus confirm that the Commission's EEO rules do not impose recruitment obligations on MPR. As discussed further below, we will not enforce MPR's internal recruitment policies.

⁴⁶ See *North American Broadcasting Co., Inc.*, Memorandum Opinion and Order, 15 FCC2d 979, 983 (Rev. Bd. 1969); *Fatima Response, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 18543, 18544 (1999); *Abundant Life, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 4972, 4974 (2001).

⁴⁷ FCC Form No. BOS-20050711AAC (Section II, Question 5, amended Oct. 21, 2005). Barker's allegations regarding MPR's intentions in filing a prior version of its Articles is unsupported and speculative, and therefore warrants no further discussion.

⁴⁸ The Commission takes into account certain *adjudicated* non-Commission misconduct involving: felony convictions; fraudulent misrepresentations to governmental units; and violations of antitrust or other laws protecting competition. See *John H. Banzhaf III*, Letter, DA 14-1867, 29 FCC Rcd ____ (MB Dec. 18, 2014), p. 4, citing *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1190-91 ¶ 23 (1986) (subsequent history omitted).

Ownership Report. Section 73.3615 of the Commission's Rules ("Rules") requires that ownership reports for NCE stations include, among other things, the "name, residence, citizenship, race or ethnicity, gender, and stockholding of every officer, director, trustee, executor, administrator, receiver and member of an association, and any stockholder which holds stock accounting for 5 percent or more of the votes of the corporation."⁴⁹ Because MPR admits that the Station's address is not the residence of the board members, listing the Station address as their residence violates this provision. MPR must amend its most recent ownership report accordingly. If it fails to do so within 10 business days of this letter, we will set aside our grant of the Renewal Application pursuant to Section 73.113(a) of the Rules.⁵⁰

Indecency Complaints. We do not rule on the merits of Petitioners' indecency allegations. However, we have reviewed the facts presented in the petitions and have concluded that, even if a violation were adjudicated based on these facts, such a violation would not justify denial or designation of the license renewal application or demonstrate a pattern of non-compliant behavior.

Conclusion. Regarding the allegations that do not pertain to indecency, we find that Petitioners have failed to establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(k) of the Act. Similarly, with respect to the indecency complaints, Petitioners have failed to establish that the facts justify denial or designation of the Renewal Application. As discussed above, we find no evidence of violations that, when considered together, evidence a pattern of abuse.⁵¹ Further, we find that the Station served the public interest, convenience, and necessity during the subject license term.

Accordingly, IT IS ORDERED that, the informal objections filed by Ms. Vicky J. Barker on September 12, 2005, and Ms. Karla Prudent on January 6, 2006, ARE DISMISSED IN PART and DENIED IN PART.

⁴⁹ 47 C.F.R. § 73.3615(a)(3)(i)(A).

⁵⁰ 47 C.F.R. § 1.113(a) ("Within 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel, or board taking the action may modify or set it aside on its own motion."). See *John Crigler, Esq.*, Letter, 29 FCC Rcd 9601 (MB 2014) (reconsideration grant conditioned on applicant action on related matter within 10 business days). As Section 73.3615 does not speak to telephone numbers, we find Barker's allegation meritless in this respect.

⁵¹ For example, we do not find here that MPR's operation of the Station "was conducted in an exceedingly careless, inept and negligent manner and that the Licensee is either incapable of correcting or unwilling to correct the operating deficiencies." See *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that "the number, nature and extent" of any alleged violations indicate that "the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Heart of the Black Hills Stations*, 32 FCC 2d at 200. See also *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991), *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

IT IS FURTHER ORDERED that, pursuant to Section 309(k) of the Communications Act of 1934, as amended, the license renewal application of Moab Public Radio, Inc., for Stations KZMU(FM), Moab, Utah and K291AF, Castle Valley, Utah (including File Nos. BRED-20050527ANY and BRFT-20050527ANZ, respectively) IS GRANTED, subject to the requirement that Moab Public Radio, Inc. amend its most recent ownership report (FCC File No. BOS-20131028ASA) to show the residence address of each member of its board of directors within 10 business days of the date of this letter. Licensee will also send electronic notification on the date such amendment is made to Maureen.McCarthy@fcc.gov and Penelope.Dade@fcc.gov.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau