

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

In the Matter of Application for Consent)
to the Assignment of Noncommercial) File No. BALED-20160204AFY
Educational Radio Station License for)
KPLU-FM, Tacoma, Washington and)
associated stations

To: The Office of the Secretary
Attn: Chief, Media Bureau

OPPOSITION TO PETITION TO DENY

University of Washington (UW), by counsel, files this Opposition to the Petition to Deny (Petition) of Carol MacKinnon (Petitioner) to the above-captioned application for consent to assignment of the license for Station KPLU-FM (KPLU), Takoma, Washington from Pacific Lutheran University, Inc. (PLU) (Application). Petitioner states that she is a resident of the City of Tacoma and a listener and financial supporter of KPLU. The Petition is wholly without merit and should be denied, and the Application should be granted.¹

Background

1. UW is an agency of the State of Washington. It has campuses in Seattle, Tacoma, and Bothell, Washington and is governed by a ten-member Board of Regents appointed by the Governor of Washington. UW is the licensee of Station

¹ A document titled "Petition to Deny the License Transfer of Radio Station KPLU to KUOW/University of Washington" was filed by Ron Waters of Hartford, Connecticut using the FCC's Consolidated Database system. He has not stated that he is a listener nor has he complied with the formalities of a Petition to Deny, including verification of facts alleged. He did not serve counsel for the parties. His "Petition" raises issues similar to those raised by the Petitioner, which are without merit, and it should be dismissed or denied.

KUOW-FM, Seattle (KUOW), which has been on the air since 1952. KUOW and its associated satellite stations provide programming emphasizing the news/talk format, including programming from National Public Radio (NPR), the Northwest News Network, the BBC and locally produced and focused news, public affairs and music programming. UW is assisted in its operation and management by Puget Sound Public Radio (PSPR), a non-profit corporation governed by an independent board. The associated satellite Stations KUOW(AM), Tumwater and KQOW (FM), Bellingham repeat the KUOW programming under FCC-granted studio waivers. PSPR had been the licensee of KUOW(AM) and KQOW(FM) until 2011, when ownership of the stations was consolidated under UW.

2. Pacific Lutheran University, Inc. (PLU) is the licensee of Station KPLU, Tacoma, and satellite Stations KPLI (FM), Olympia; KVIX(FM), Port Angeles; and KPLK, Sedro-Woolley.² The application before the Commission seeks authority for UW to acquire these stations and their associated FM translators.³

3. Discussions for various combinations of the UW and PLU radio operations have taken place on-and-off for decades until the present agreement for sale was reached last year. The announcement of the sale was made before the Asset Purchase Agreement (APA) had been finalized. Some KPLU listeners expressed a desire to preserve the station in its current form. In response, UW

² PLU is filing its own separate Opposition today.

³ Petitioner claims that KPLU covers “almost the entire geographic area of western Washington”, while KUOW “covers merely the immediate vicinity of the Seattle/Tacoma/Bellevue CMSA.” (Pet at 2-3). This is a mischaracterization of KUOW’s reach and KPLU’s limits. KUOW has much higher listenership and a much larger share of listeners in the western Washington area. KUOW also has online and streaming services that bring its content to a much broader area.

and PLU agreed to add a provision to the final APA to allow a qualified community group to make an offer for the station. Specifically, such a group must make a "matching offer" deemed acceptable to PLU and also complete its own agreement for purchase with PLU by June 30, 2016, in which case UW would allow the cancellation of its APA.

4. UW's current plan for combined operations of the radio stations will transition the format of the station currently known as KPLU on 88.5 MHz to one which is primarily music, and in particular jazz. Puget Sound listeners will have two distinct public radio stations – one for jazz and the other for news, talk, and spoken word content and content emanating from the Pacific Northwest region. UW adopted this plan based on consultation with PSPR, other local groups and supporters, and national public broadcasting leaders. All relevant open meeting and public notice requirements were scrupulously followed by UW in the creation and approval of the plan.

5. The proposed transaction constitutes consolidation of a type that is encouraged by the Corporation for Public Broadcasting (CPB) in its efforts to eliminate duplicative services by the stations it supports. The fact of the matter is that KUOW and KPLU are highly redundant services. As NPR stations, 65 hours of their content is identical, constituting 40% overlap within the broadcast week. Listeners, many of whom support both KUOW and KPLU, are paying twice towards carriage fees for syndicated content. A unified and enhanced service, as contemplated by the Application, will benefit the Puget Sound region and beyond and provide for much more efficient use of community resources invested in the service. A full 60% of the top 20 public radio stations/networks

nationally hold multiple frequencies distributing discrete formats. The type of service contemplated by the Application is well-established in the industry as a means to preserve and sustain a breadth of noncommercial services to communities.

The Application Is Not Subject to the Contingent Application Rule

6. Petitioner initially argues that the Application “is a contingent agreement prohibited under the Commission’s rules and policy,” that it violates Section 73.3517 of the Commission’s rules as a “contingent application,” or that alternatively it is simply of a type that “represent an impermissible waste of Commission staff resources because of complex contingencies that still need to be resolved.” (Petition at pp. 6-8). Petitioner’s reliance on this rule provision is completely inapposite.

7. There is no doubt that Section 73.3517 applies only to applications for new stations and for technical modifications of stations – not applications for ownership changes. When amending the rule in 1999, the Commission described it as such:

Section 73.3517 of the Commission's rules prohibits the filing of contingent new station and modification applications in the broadcast services. The Commission first announced this policy in a 1961 Public Notice and subsequently codified the restriction. It was adopted to bring greater administrative orderliness to the broadcast licensing process. The Commission found that it was frequently holding applications in pending status that were contingent on the grant of other applications involved in lengthy hearings. An application is "contingent" when it cannot be granted unless and until a second application, also pending before the Commission, is granted. (footnotes deleted).

First Report and Order in MM Docket 98-93, 14 FCC Rcd 5272, 5280 (1999). The Application is simply not a “contingent” application within the meaning of Section 73.3517, which is of no relevance to the proposed transaction.

8. Petitioner is wrong as both a matter of law and policy. The fact that a proposal has a provision which might allow substitution of a new assignee likewise has no bearing on the acceptability of the related application or on the propriety of its processing through to a grant. The public interest in timely approval of the transaction weighs heavily in favor of routine processing of the Application. UW and PLU filed a complete application, with a fully compliant APA and the applications were duly accepted for filing by the FCC. While there is a possibility that another party will make an offer that will result in a substitute proposal, that possibility is purely speculative. If it does not materialize, it is imperative to the parties that this transaction move forward without delay.

Alleged Violations of Federal Law Governing Funding of Public Broadcasting Are Irrelevant to Processing and Grant of the Application

9. Petitioner has raised a grab-bag of issues purportedly based on sections of the Communications Act (Act) relating to the funding of public broadcasting stations and has filed with CPB a related complaint against PLU regarding these alleged violations. (Petition, p. 10). The complaint alleges violation of sections of the Communications Act at 47 U.S.C. 396(k)(7) (“Use of CPB Funds”) and 47 U.S.C. 396(k)(4) (“Open Meetings”).

10. The FCC has neither the authority nor responsibility for enforcement of Section 396 of the Act; that lies wholly with CPB, which may review the complaint and, if found necessary, fashion any appropriate remedy independent of the processing of the Application and consummation of the transaction by UW and

PLU. Petitioner cites no basis for the FCC to defer processing of the Application other than the inchoate prospect that a competing purchaser may surface. It is well-settled that the FCC does not adjudicate private claims that are properly within the jurisdiction of other bodies. *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1205 (1986). With regard to the CPB claims:

It is well settled that the CPB has exclusive congressional responsibility for the distribution of funds pursuant to Section 396 of the Act, and that the Commission does not consider a licensee's compliance with that section in its licensing proceedings. See *KQED, Inc.*, 88 FCC 2d 1159, 1164-65 (1982), *aff'd*, *California Public Broadcasting Forum v. FCC*, 752 F.2d 670 (D.C. Cir. 1985).

In re Applications of WQED Pittsburgh (Assignor) and Cornerstone Television, Inc. (Assignee) ["WQED/Cornerstone"], 15 FCC Rcd. 202, 206 (1999).

In the instant case, the sole question before the agency is whether the assignor and the proposed assignee are qualified to consummate the transaction. The alleged violation of laws is simply irrelevant to the application at hand.⁴

The "Public Interest" Would Not Be Served By Delaying the Processing of the Application

11. Finally, petitioner claims that "the application is not in the public interest" based on a mélange of further charges of violation of the Act governing federal funding of public broadcast stations, including the open meeting provisions

⁴ While irrelevant to the Commission, Petitioner's charges regarding Washington state laws cry out for response. UW followed the letter of the law. The Open Public Meeting Act (OPMA) requires the governing bodies of public agencies to hold their meetings open to the public, unless a specific exemption allows for an executive session. The Board of Regents held any discussions concerning the transaction with KPLU in accordance with the OPMA. Public sessions were held before both the Finance and Asset Management Committee and the full Board of Regents. Petitioner asserts that "UW did not reasonably or fairly identify the agenda item" (Pet. at 5, citing Wing Decl.), but does not cite a pertinent legal standard to support any inference that UW acted inappropriately.

(again), conclusory statements about the loss of an “independent” source of news and insulting statements impugning the independence of journalists working for institutions governed by state agencies, such as UW and the news staff of KUOW. In support of these claims, Petitioner presents a mash-up of newspaper editorials and miscellaneous allegations. (Petition, pp. 13-20). Petitioner asserts: “This is not a change of format case.”

12. Despite its assertion to the contrary (Petition, p. 20), Petitioner’s claims constitute a thinly-veiled attempt to block the assignment because of alleged changes to the format of KPLU. However, it is “well settled Commission policy that potential changes in programming formats are not considered in reviewing assignment applications.” WQED/Cornerstone, 15 FCC Rcd 202, 209 (1999), citing WDCU(FM), 12 FCC Rcd 15242 (MMB 1997), *rev’d in part*, 15 FCC Rcd 2534; see also, Changes in the Entertainment Formats of Broadcast Stations, 60 FCC 2d 858, 865-66 (1976), *recon. denied*, 66 FCC 2d 78 (1977), *rev’d sub nom.*, WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir 1970, *rev’d*, 450 U.S. 582 (1981)). Further, contrary to Petitioner’s claim (Petition, pp. 14-15), the FCC does not treat commercial and noncommercial transactions differently in this regard. See, e.g., WQED/Cornerstone, *supra*.

13. Petitioner’s claim (Petition, pp. 20-24) that the parties improperly conducted their negotiations secretly in derogation of applicable rules and the public interest is without merit. Indeed, by Petitioner’s own admission, the proposed assignment was publicly disclosed months before the Application was filed; Petitioner herself learned of it no later than November 12, 2015. (Declaration, p. 4). Indeed, the newspaper articles included in the Petition belie any notion that

this transaction was shielded from the public. In any event, all of Petitioner's claims relate to whether or not the parties complied with CPB or other local requirements, which are not within the FCC's purview. UW has been advised by PLU that it complied with the FCC's rule requiring on-air public notice of the assignments. Thus, from the FCC perspective, the public was given ample notice and opportunity to comment on the Application as required by the rules.

14. The public interest would not be served by delay. There could hardly be a more deleterious action impacting service to the citizens of Puget Sound. Pausing processing until after expiration of the June 30 deadline — in the event of a failed community bid — and then restarting the process would mean many months until KUOW could secure and reassign content to the acquired stations.

15. In conclusion, notwithstanding Petitioner's claims, 1) the decision on the transaction was conducted, fairly, openly and in compliance with all relevant public disclosure requirements; 2) the Application and related purchase agreement comply with all FCC requirements; 3) the parties are fully qualified to effectuate their proposed transaction; 4) Petitioner has raised no issue within the FCC's purview warranting denial of or delay in processing the Application.

WHEREFORE, UW submits that the proposed transaction will serve the public interest, convenience, and necessity and urges the Bureau to act promptly to consent to the license assignment.

Respectfully submitted,

UNIVERSITY OF WASHINGTON



By: _____

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March 21, 2016

DECLARATION

I, Norman G. Arkans, hereby declare under penalty of perjury, that:

- (1) I am the Associate Vice President for Media Relations and Communications of the University of Washington.
- (2) Except for the facts of which the Federal Communications Commission may take official notice, the facts stated in the foregoing "Opposition to Petition to Deny" are true and correct.

Dated this 18th day of March, 2016



Norman G. Arkans

CERTIFICATE OF SERVICE

I, Nancy M. Cassady, administrative assistant for the law firm of Schwartz, Woods & Miller, hereby certify that on this 21st day of March 2016, I sent a true and correct copy of the foregoing Opposition to Petition to Deny by email to the following:

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Federal Communications Commission

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**Description: UW OPPOSITION TO CAROL MACKINNON
PETITION TO DENY**

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