

# Shainis & Peltzman, Chartered

Counselors at Law

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October 16, 2018

## VIA HAND DELIVERY

Marlene H. Dortch, Esq.  
Secretary  
Federal Communications Commission  
Portals II – 12<sup>th</sup> Street Lobby  
Filing Counter – TW – A325  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Attn: Chief, Audio Division, Media Bureau

Accepted / Filed

OCT 16 2018

Federal Communications Commission  
Office of the Secretary

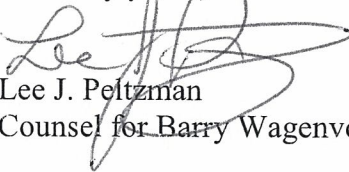
2018 OCT 17 PM 2:22

Re: Barry Wagenvoord  
BTC-201808AAI  
Facility ID No. 54613  
Petition for Reconsideration

Dear Ms. Dortch:

Transmitted herewith, on behalf of Barry Wagenvoord, transferor in the above-referenced Application for Consent to Transfer of Control of Radio Hawaii, Inc., licensee of Station KWAH(AM), Honolulu, Hawaii, is an original and four (4) copies of its Petition for Reconsideration with respect to the above-referenced Transfer of Control Application. Please contact undersigned counsel in the event the Commission has any question with respect to this filing.

Sincerely yours,



Lee J. Peltzman  
Counsel for Barry Wagenvoord

Enclosures

# Shainis & Heltzman, Chartered

Marlene H. Dortch  
October 16, 2018  
Page 2 of 2

cc: (w/enclosure)

Albert Shuldiner, Esq.  
albert.shuldiner@fcc.gov

Michael Wagner, Esq.  
michael.wagner@fcc.gov

Dan Alpert, Esq  
dja@commlaw.tv

Poka Laenui, Esq.  
plaenui@hawaiiperspectives.org

2018 OCT 17 PM 2:22

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

Accepted / Filed

OCT 16 2018

Federal Communications Commission  
Office of the Secretary

In re Application of )

**BARRY WAGENVOORD** )  
**(Transferor)** )

File No. BTC-20180820AAJ

Facility ID No. 54613

and )

**WAGENVOORD ADVERTISING** )  
**GROUP, INC.** )  
**(Transferee)** )

For Consent to Transfer of Control of )  
Radio Hawaii, Inc., Licensee of Station )  
KWAI(AM), Honolulu, HI )

ATTN: Chief, Audio Division, Media Bureau

**PETITION FOR RECONSIDERATION**

Barry Wagenvoord ("BW" or "Wagenvoord"), the transferor listed in the above-captioned Application for FCC Consent to Transfer Control (the "Application") of Radio Hawaii, Inc. ("Radio Hawaii"), licensee of Station KWAI(AM), Honolulu, Hawaii, by his attorney and pursuant to Section 1.106 of the Commission's rules, hereby files his Petition for Reconsideration (the "Petition") of the FCC grant of the Application, filed on August 20, 2018 by Wagenvoord Advertising Group, Inc. ("WAGI"). The Application was approved by the Commission on September 11, 2018, less than three weeks after being placed on FCC Public Notice. Public Notice of the approval was given by the FCC on September 14, 2018. For the reasons set out below, this Petition should be granted and the

earlier Application grant should be rescinded. In support of its position, Wagenvoord submits the following:

The FCC approved the Application seeking to remove Barry Wagenvoord and transfer his ownership in Radio Hawaii to WAGI based on its reading of a tentative Judge's Order considering *"Plaintiff's [WAGI's] Proposed Order Granting Plaintiff's Motion to Enforce Settlement Agreement"* issued by the Circuit Court of the First Circuit of the State of Hawaii, on July 12, 2018. The Court's Order was reporting on a hearing with respect to litigation involving a claim by WAGI's owner, Lola Wagenvoord, Barry Wagenvoord's former stepmother, for the remaining 50% of Radio Hawaii's ownership interest to be transferred to WAGI, presently owned by Lola Wagenvoord.

The tentative Judge's Order was substituted in the Application in place of BW's signature. Attached to the Order was a severely edited "Court Order Granting Plaintiff's Motion to Enforce Settlement Agreement", containing numerous deletions and a Settlement Agreement, 98% of which had been deleted by the Court and replaced with no substitute language. In that respect, because of the amount of deletions, the Court expressly invited WAGI's counsel "to resubmit Plaintiff's proposed order, consistent with the Court's edits, along with a filed Notice of Submission to defense counsel, so the formal record is clear when it was served. The Court will wait for objection or suggestion from defense counsel [for Barry Wagenvoord] per [local] CCR Rule 28."<sup>1</sup> The "invitation" by the Court was more of a polite directive, but a directive, nonetheless, to counsel for WAGI, rather than leaving it up to counsel to decide what action to take.

WAGI did not submit its proposed Order to the Court, along with a filed Notice of Submission to defense counsel, until weeks after the FCC had granted the Application. Because the proposed Order was not resubmitted until September 28<sup>th</sup> and was only received by counsel for Wagenvoord a matter of days ago, there was no opportunity for Wagenvoord's counsel to make

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<sup>1</sup> *Order Regarding Plaintiff's Proposed Order Granting Plaintiff's Motion to Enforce Settlement Agreement* issued in *Wagenvoord Advertising v. Wagenvoord*; Civil No. 1CC16-1-1732 (JPC), *Circuit Court of the First Circuit, 6<sup>th</sup> Division, State of Hawaii*, dated July 12, p.2. In a separate paragraph of the Court Order, the Court stated that if it had stricken something from the proposed Order that WAGI's counsel thought was crucial, counsel was free to resubmit stricken material to the Court with an explanation as to why it should be included.

objections or suggestions. Having never previously received a resubmitted proposed Order while the KWAI Transfer of Control Application was pending, there was nothing for Wagenvoord's counsel to object to or suggest. Recently, the proposed Order has been received, an objection has been filed, and there is no final order by the trial court.<sup>2</sup>

Despite this, when the Commission reviewing attorney expressly asked counsel for WAGI to confirm that the attorney's interpretation of the Court Order was correct—that the Judge in the litigation was stating that WAGI's "counsel is free to resubmit stricken material to the court if it believes the Judge excised something in error"<sup>3</sup>—Communications counsel for WAGI, immediately, confirmed that "you understand it [the Court Order] correctly. There have been no subsequent orders,"<sup>4</sup> in order to obtain a speedy grant. And, in fact, the Transfer of Control Application was granted by the Commission that day.

But, the response from WAGI's FCC counsel was misleading and was a clear misstatement. The Court is no way was suggesting that counsel for WAGI should only resubmit the Order if it objected to any of the language stricken by the Judge. To the contrary, as established by an October 10 email from Manta K. Dircks, the Law Clerk to the Honorable Jeffrey P. Crabtree, the Judge presiding in the WAGI-Wagenvoord Hawaii litigation, to Grant Kidani, local counsel for WAGI and Poka Laenui, local counsel for Wagenvoord, WAGI's communications counsel's September 11, 2018 email to the FCC reviewing attorney was absolutely and fundamentally incorrect in that the reason there had been "no subsequent [final] order" was because WAGI has failed to resubmit the Order as directed by the Judge.

"Dear Mr. Kidani:

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<sup>2</sup> Counsel for Wagenvoord, upon receipt of the proposed Amended Order of Lola Wagenvoord, filed an objection with the court on October 15, 2018. Her attorney acknowledged the objection and has stated in an email to Wagenvoord's counsel that "we can fix your concerns, which will be sent..." Email, dated October 15, 2018 from Grant Kidani to Poka Laenui and Manta K. Dircks, Law Clerk to the Presiding Judge.

<sup>3</sup> Email, dated September 11, 2018 from Michael Wagner to Lee Peltzman and Dan Alpert. *See Attachment A.*

<sup>4</sup> Email, dated September 11, 2018 from Dan Alpert to Michael Wagner. *See Attachment A.*

We received on 10/9/18 your Notice of Submission (filed 9/28/18) of your amended order, and a cover letter dated 10/9/ 18 saying the 'Certificate of Service' should have been attached.

We never received any Notice of Submission (whether COS attached or not). All we got was your proposed Amended Order, which we received on 9/28. *Per prior communication from me, the court was taking no action on your proposed order because we received no indication it was ever submitted to Mr. Laenui.* Now that we have received your Notice [showing] that it was served on 9/28, [the] judge can finalize an order. Mr. Laenui, please call or e-mail me to let me know if you will be submitting any objections or comments re the form of the proposed Amended Order.

Thank you,

Manta K. Dircks

Law Clerk to the Honorable Jeffrey P. Crabtree

Circuit Court of the First Circuit, 6<sup>th</sup> Division

1111 Alakea St., Courtroom 5C

Honolulu, HI 96813

Telephone: (808) 538-5181"<sup>5</sup>

Poka Laenui responded to Mr. Dircks email on October 10 that he could not confirm that he had received Mr. Kidani's Amended Order or Certificate of Service. Mr. Laenui asked Mr. Kidani to send "another copy of your proposed Amended Order for my review and allow us to proceed in the

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<sup>5</sup> Email from Manta K. Dircks, Law Clerk to Judge Jeffery P. Crabtree, to Grant Kidani and Poka Laenui, dated October 10, 2018 (emphasis added). *See Attachment B.* This email, sent within the last week by the Judge's law clerk to the parties to the litigation provides direct evidence of the Judge's intent in his Order. While the FCC would have no knowledge how language in the Order should be interpreted, certainly, the party offering that Order in support of its Application would have reason to know and should know what it meant.

regular way of review and court consideration whether such proposed order is consistent with the Court's prior instructions."<sup>6</sup>

These emails establish proof positive that the Judge's proposed Order, containing handwritten instructions and numerous deletions, contrary to WAGI's counsel confirmation to FCC counsel, was intended, instead, to be a tentative action, and that the Judge would only "finalize an order" after counsel for WAGI resubmitted an Order, subject to Wagenvoord's counsel's right to make objections or suggestions. Until Wagenvoord's counsel had the opportunity to object or suggest, the Court "was taking no action on [WAGI's] proposed Order." And even to this day, the Court has not rendered a decision on WAGI's resubmitted proposed Order. It is unknown what that ruling will be and when it will be issued, since counsel for Wagenvoord has only now been provided a copy of the resubmitted Order to review and filed an objection.

What is known, however, is that WAGI abused the FCC's licensing process by telling a story to the FCC. Whether that misleading response constitutes a lack of candor, or a reckless disregard for the truth of a statement made to the FCC, WAGI is guilty of seeking to mislead the FCC. Its action cannot be whitewashed away. Proof that its intentions were motivated by an intent to mislead is that what WAGI clearly sought from the Commission was an immediate FCC grant and an immediate grant is what resulted from its misleading response.

Thus, the Court case is not over and the Court's minutes with strikings and deletions was not intended to be a final Order of the Court. In fact, there has been no final determination by the presiding Judge yet. Moreover, only upon such a final Order being issued by the Court does either party have a right to appeal the Court's determination to the Hawaii Appellate Court.<sup>7</sup> If the matter is appealed to the Hawaii Appellate Court, many things may happen, including the Circuit Court

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<sup>6</sup> Email, dated October 10, 2018, from Poka Laenui to Grant Kidani and Manta K. Dircks. A few minutes later, Mr. Laenui notified Mr. Dircks that he had asked Mr. Kidani to send a copy of his proposed Amended Order to Mr. Laenui because he had no record of receiving the proposed Order. *See Attachment B.*

<sup>7</sup> Counsel for Wagenvoord will bring WAGI's actions before the FCC to the attention of the Court and requests appropriate reprimand as to WAGI. However, the misleading statement was made directly to the Commission.

suspending its order pending the appeal, a reversal of the Circuit Court's order (with instructions on how to further proceed), or simply sustain the Circuit Court's order.

As noted, given the present state of the current lawsuit, there has been no final determination by the Court hearing the litigation between Wagenvoord and WAGI or the judicial process in Hawaii. Therefore, any action taken by the FCC was and is legally premature. The FCC must have a final determination by the trial Court prior to the Commission approving transfer of Radio Hawaii's ownership, which question must initially reside in the State of Hawaii as a matter of State property law. Moreover, by the Court rules, an appellant has thirty (30) days from the date of a trial court's final order to appeal the order, as well as the right to file motions to withhold the application of the final Order, pending appeal, thereby suspending the Court order until a determination is made by the appellate court.

It should also be noted that the Commission approval of the Application violated Section 310 of the Communications Act of 1934, as amended (the "Act"). The Application was the last in a succession of three (3) Applications for Consent to Transfer of Control (short form) Applications (filed on FCC Form 316) for Radio Hawaii. The first application (the "First Application") (BTC-20150520ACP), in May 2015, sought Commission consent for a transfer of David Wagenvoord, father of Barry Wagenvoord, and former husband of Lola Wagenvoord, interest in WAGI to Lola Wagenvoord as Personal Representative upon David Wagenvoord's death. Next, in a Second Application for Consent to Transfer of Control (short form) Application, filed on FCC Form 316 (BTC-20150717ABI), Lola Wagenvoord, as Personal Representative, transferred her ownership interest in WAGI to Lola Wagenvoord, individually. So, as a result of the First Application and the Second Application, both short form Applications, Lola Wagenvoord's interest in Radio Hawaii went from owning 50% of WAGI, a shareholder owning 50% of Radio Hawaii (or, 25% of Radio Hawaii) to owning 100% of a 50% ownership interest in Radio Hawaii (or, 50% of Radio Hawaii). In the current Application, Lola Wagenvoord seeks to go from 50% ownership in Radio Hawaii to 100% ownership, again by short form (FCC Form 316) Application. That means that Lola Wagenvoord has gone from being a 25% owner to a 100% owner without ever filing a long form Application with the FCC. Thus, Lola Wagenvoord will have evaded the requirements of Section 310 of the Act by



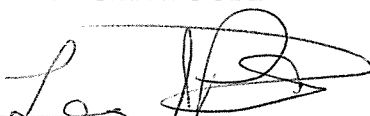
seeking to go from less than a 50% ownership of a licensee to 100% absolute control of that license without ever filing a long form application or that application appearing on an FCC Public Notice for thirty (30) days before FCC action. That is legally incorrect. Counsel does not impute any ill intent on counsel for WAGI in this case for filing a third FCC Form 316, since all three Applications must be considered to reach the conclusion that a long form is required, and it would be easy to focus only on the instant Application without considering the First or Second Applications as well. But this does not change the fact that there has been a substantial change in ownership by Lola Wagenvoord, starting with her 25% ownership and now seeking absolute 100% control of Radio Hawaii. Her qualifications must be passed on as any other applicant would be by the FCC.

For the reasons stated hereby, the Commission should reconsider its favorable action on the Application, rescind its earlier grant and place the Application on hold pending a final judgement by the Hawaiian judicial process and the filing of an FCC Form 315 Application.

Respectfully submitted,

BARRY WAGENWOORD

By: \_\_\_\_\_

  
Lee J. Peltzman  
His Attorney

Shainis & Peltzman, Chartered  
1850 M St NW, Suite 240  
Washington, DC 20036  
(202) 293-0011  
lee@s-plaw.com  
October 15, 2018

## **ATTACHMENT A**

A

**Lee Peltzman**

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**From:** Michael Wagner <Michael.Wagner@fcc.gov>  
**Sent:** Tuesday, September 11, 2018 9:15 AM  
**To:** Lee Peltzman <lee@s-plaw.com>; Dan J. Alpert (dja@commlaw.tv) <dja@commlaw.tv>  
**Cc:** Annette Smith <Annette.Smith@fcc.gov>; Raquel Hutson <Raquel.Hutson@fcc.gov>  
**Subject:** KWAI(AM), Honolulu, Hawai'i short-form TC application, BTC-20180820AAI. Please explain.

Lee and Dan,

I have before me for review the little involuntary 316 application for Radio Hawai'i, Inc.'s station KWAI(AM) in Honolulu. I think I understand what's going on here – Barry and Sam Wagenvoord agreed to sell their interests in Radio Hawaii to Lola Wagenvoord's Wagenvoord Advertising Group, Inc., and a local court is making them do it – but the July 12, 2018, Court Order has a whole bunch of edits and scratch-outs, apparently by the presiding judge himself, who comes off as none too pleased with the litigants.

The Court indicates that Wagenvoord Advertising's counsel is free to resubmit stricken material to the court if it believes the judge excised something in error. I just want to be sure that:

- 1) I understand the case correctly; and
- 2) The July 12 order is the final word, that there are no other subsequent court orders to consider here.

Please either confirm or correct this for me. I am poised to grant if I have it right and we have everything we need.

Thanks,

MW

A

## Lee Peltzman

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**From:** Dan J. Alpert <dja@commlaw.tv>  
**Sent:** Tuesday, September 11, 2018 9:49 AM  
**To:** 'Michael Wagner'; Lee Peltzman  
**Cc:** 'Annette Smith'; 'Raquel Hutson'  
**Subject:** RE: KWAI(AM), Honolulu, Hawai'i short-form TC application, BTC-20180820AAI. Please explain.

Michael:

You understand it correctly. There have been no subsequent orders.

An e-mail message from:  
Dan J. Alpert  
The Law Office of Dan J. Alpert  
2120 N. 21st Rd.  
Arlington, VA 22201

703-243-8690 (business)  
703-539-5418 (fax)

(Please note: This is a message sent by an attorney. It is confidential. It may contain privileged attorney-client communication or work product intended only for the individual or entity named within the message. If you are not the intended recipient, or the agent responsible to deliver it to the intended recipient, any review, dissemination, distribution, or copying of this message is prohibited. If this email message was received in error, it would be appreciated if you would notify me by reply e-mail and delete the original message from your system. Thank you for your cooperation.)

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**From:** Michael Wagner [mailto:Michael.Wagner@fcc.gov]  
**Sent:** Tuesday, September 11, 2018 9:15 AM  
**To:** Lee Peltzman <lee@s-plaw.com>; Dan J. Alpert (dja@commlaw.tv) <dja@commlaw.tv>  
**Cc:** Annette Smith <Annette.Smith@fcc.gov>; Raquel Hutson <Raquel.Hutson@fcc.gov>  
**Subject:** KWAI(AM), Honolulu, Hawai'i short-form TC application, BTC-20180820AAI. Please explain.

Lee and Dan,

I have before me for review the little involuntary 316 application for Radio Hawai'i, Inc.'s station KWAI(AM) in Honolulu. I think I understand what's going on here – Barry and Sam Wagenvoord agreed to sell their interests in Radio Hawaii to Lola Wagenvoord's Wagenvoord Advertising Group, Inc., and a local court is making them do it – but the July 12, 2018, Court Order has a whole bunch of edits and scratch-outs, apparently by the presiding judge himself, who comes off as none too pleased with the litigants.

The Court indicates that Wagenvoord Advertising's counsel is free to resubmit stricken material to the court if it believes the judge excised something in error. I just want to be sure that:

1) I understand the case correctly; and

2) The July 12 order is the final word, that there are no other subsequent court orders to consider here.

Please either confirm or correct this for me. I am poised to grant if I have it right and we have everything we need.

Thanks,

MW

## **ATTACHMENT B**

## Lee Peltzman

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**From:** kwai808 <kwai808@gmail.com>  
**Sent:** Monday, October 15, 2018 2:40 PM  
**To:** Lee Peltzman  
**Subject:** Fwd: Re: Wagenvoord v. Wagenvoord; 18-1-1387

Sent from my Galaxy Tab A

----- Original message -----

**From:** Poka Laenui <plaenui@hawaiianperspectives.org>  
**Date:** 10/10/18 8:21 PM (GMT-10:00)  
**To:** Grant Kidani <grant@kidani.com>, 'Manta K Dircks' <Manta.K.Dircks@courts.hawaii.gov>  
**Subject:** Re: Wagenvoord v. Wagenvoord; 18-1-1387

Dear Mr. Kidani and Mr. Dircks:

I have not been able to find and therefore can not confirm that I received Mr. Kidani's amended order as well as the Certificate of Service. Mr. Kidani, could you please send to me another copy of your proposed Amended Order for my review and allow us to proceed in the regular way of review and court consideration whether such proposed order is consistent with the court's prior instructions.

Sincerely,

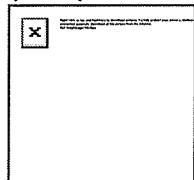
Poka Laenui

On 10/10/2018 8:09 AM, Grant Kidani wrote:

Confirmed, sorry for our failure to get you the document.

*Grant K. Kidani, Esq.*

(808) 538-1818



**From:** Manta K Dircks [mailto:Manta.K.Dircks@courts.hawaii.gov]  
**Sent:** Wednesday, October 10, 2018 8:03 AM  
**To:** plaenui@hawaiianperspectives.org; grant@kidani.com  
**Subject:** Wagenvoord v. Wagenvoord; 18-1-1387

Dear Mr. Kidani:

We received on 10/9/18 your Notice of Submission (filed 9/28/18) of your amended order, and a cover letter dated 10/9/18 saying the "Certificate of Service should have been attached."

We never received any Notice of Submission (whether COS attached or not). All we got was your proposed Amended Order, which we received on 9/28. Per prior communication from me, the court was taking no action on your proposed order because we received no indication it was ever submitted to Mr. Laenui. Now that we have received your Notice that it was served on 9/28, judge can finalize an order.

Mr. Laenui, please call or e-mail me to let me know if you will be submitting any objections or comments re the form of the proposed Amended Order.

Thank you,

Manta K. Dircks

Law Clerk to the Honorable Jeffrey P. Crabtree

Circuit Court of the First Circuit, 6th Division

1111 Alakea St., Courtroom 5C

Honolulu, HI 96813

Telephone: (808) 538-5181



**Lee Peltzman**

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**Subject:** FW: Re: Wagenvoord v. Wagenvoord; 18-1-1387

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**From:** Lee Peltzman  
**Sent:** Monday, October 15, 2018 3:08 PM  
**To:** Michael Nuell <Michael@s-plaw.com>  
**Subject:** FW: Re: Wagenvoord v. Wagenvoord; 18-1-1387

Sent from my Galaxy Tab A

----- Original message -----

**From:** Poka Laenui <[plaenui@hawaiianperspectives.org](mailto:plaenui@hawaiianperspectives.org)>  
**Date:** 10/10/18 8:25 PM (GMT-10:00)  
**To:** Manta K Dircks <[Manta.K.Dircks@courts.hawaii.gov](mailto:Manta.K.Dircks@courts.hawaii.gov)>, [grant@kidani.com](mailto:grant@kidani.com)  
**Subject:** Re: Wagenvoord v. Wagenvoord; 18-1-1387

Dear Mr. Dircks:

I had just responded to Mr. Kidani's email to you, to which was attached this email. I have asked Mr. Kidani to send me a copy of his proposed amended order because I have no record of receipt of said proposed order.

Sincerely,

Poka Laenui

On 10/10/2018 8:03 AM, Manta K Dircks wrote:

Dear Mr. Kidani:

We received on 10/9/18 your Notice of Submission (filed 9/28/18) of your amended order, and a cover letter dated 10/9/18 saying the "Certificate of Service should have been attached."

We never received any Notice of Submission (whether COS attached or not). All we got was your proposed Amended Order, which we received on 9/28. Per prior communication from me, the court was taking no action on your proposed order because we received no indication it was ever submitted to Mr. Laenui. Now that we have received your Notice that it was served on 9/28, judge can finalize an order.

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Thank you,

Manta K. Dircks

Law Clerk to the Honorable Jeffrey P. Crabtree

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