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July 16, 2019

VIA COURIER

Accepted / Filed

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554
Attn: Media Bureau, Audio Division

JUL 16 2019

Federal Communications Commission
Office of the Secretary

Re: WUEV(FM), Evansville, Indiana, BALED-20190528AAM

Dear Ms. Dortch:

The University of Evansville (“UE”), by its counsel, hereby replies to the Informal Objection filed by Tom Varner (“Varner”) and received by the FCC on June 10, 2019 (the “Varner Letter”), the Informal Objection submitted by Tom Fischer (“Fischer”) by email to FCC staff on June 28, 2019 (the “Fischer Email”), and a compilation of form letters submitted by “Ashley and Concerned Students at UE” (the “Form Letters” and, with the Varner Letter and the Fischer Email, the “Objections”), regarding the pending license assignment application for noncommercial educational radio station WUEV(FM) (the “Station” or “Station WUEV”).¹

Background. The authors of the Objections are upset about the proposed changes for Station WUEV. Station WUEV, under the 68-year-long stewardship of UE, has a long history of service to the Evansville community, which has allowed Station WUEV to forge a strong bond with its supporters. This bond, however, does not create a legal requirement that UE must remain the FCC license-holder for the Station or that UE must sell the Station only to an entity approved of by authors of the Objections.

The Commission should deny the Objections and promptly grant the application. The Objections are not supported by affidavits or declarations under penalty of perjury and thus are procedurally defective as petitions to deny.² Informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact calling for inquiry as to whether grant of an application would be *prima facie* inconsistent

¹ CDBS File No. BALED-20190528AAM (the “Assignment Application”). Neither UE nor WAY-FM were served with copies of any of the Objections.

² See 47 U.S.C. § 309(d)(1) 47 C.F.R. § 73.3584.

with Section 309 of the Communications Act.³ None of the Objections raise any substantial and material question of fact that assignment of the WUEV license would be contrary to the public interest, convenience and necessity. Indeed, as set forth below, the proposed license assignment meets the applicable legal standard – it complies with FCC rules and serves the public interest – and, therefore, the application is entitled to prompt processing and grant.

Format Changes and the Public Interest. Varner raises the loss of jazz and rap programming, implying that the FCC should stop the station sale to preserve this programming. Varner's programming argument is an attempt to preserve the status quo of Station WUEV, including its programming format. Petitioner's real gripe here is not against the sale of the Station to WAY-FM, but rather the change of the Station's programming – a decision clearly reserved for the licensee under the Commission's broadcast regulatory scheme.⁴

The Commission does not scrutinize or regulate programming, nor does it take into consideration potential changes in programming formats in reviewing assignment applications.⁵ In 1976, the Commission concluded, in a Policy Statement, that review of program formats was not required by the Communications Act, would not benefit the public, would deter innovation, and would impose substantial administrative burdens on the Commission.⁶ The Supreme Court of the United States has upheld this policy.⁷ Thus, a change in programming is not a material fact that the FCC considers in ruling on applications for license transfer.⁸

³ See 47 U.S.C. § 309(a); *WWOR-TV, Inc.*, 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) *rehearing den.* (Sept. 10, 1993).

⁴ See, e.g., *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917, 921 (D.C. Cir. 1978); *Trustees of the University of Pennsylvania*, 69 FCC 2d 1394 (1978).

⁵ See, e.g., *Trinity International Foundation, Inc., WKCP(FM), Miami, Florida*, 23 FCC Rcd 4000 (2009).

⁶ See *Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 FCC2d 858, 865-66 (1976), *recon. denied*, Memorandum Opinion and Order, 66 FCC2d 78 (1977), *rev'd sub nom., WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979), *rev'd*, 450 U.S. 582 (1981).

⁷ *FCC v. WNCN Listener's Guild*, 450 U.S. 582, 585 (1981). See also *In re WKAF(FM)*, 21 FCC Rcd 14988 (Dec. 27, 2006), *citing FCC v. WNCN Listener's Guild*, 450 U.S. 582, 585 (1981).

⁸ The Commission has consistently rejected format-based objections:

While the Commission recognizes that WDCU(FM)'s jazz format has attracted a devoted listenership, it is well-settled Commission policy that potential changes in programming formats are not considered in reviewing assignment applications. See *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. 1979), *rev'd*, 450 U.S. 582 (1981). With regard to public broadcasting in particular, the Commission historically "has had the appropriately limited role of

Fischer notes that WAY-FM “already has a frequency” in Evansville and claims that the transaction will result in “redundancy of the public airwaves.” WAY-FM is licensee of FM translator W220DV, Evansville, Indiana. As set forth above, the programming format WAY-FM chooses for Station WUEV after closing is not a matter for FCC consideration.

Public Involvement. Varner expresses concern that UE allegedly did not “consult affected students and station alumni about the decision.” The Commission has never dictated how business negotiations among parties must be conducted or required that such negotiations be conducted in a public process. There is no FCC requirement that a licensee consult with its community (or its supporters) before making critical decisions about the licensee’s broadcast station, including the terms of a station sale – those decisions are reserved for the licensee under the broadcast regulatory scheme. Fischer also claims that an email from September 2018 instructing Station on-air personnel not to discuss the sale amounts to censorship. UE, as licensee of Station WUEV, has the right and responsibility to set programming policy for the station. Moreover, UE’s request was completely appropriate, particularly in light of the confidentiality obligations that are associated with negotiating a transaction of this type.

Transaction Terms and Timing. On a related note, Varner, Fischer, and the Form Letters raise questions regarding certain details of the proposed transaction. First, both Varner and Fischer claim that UE “waited” until summer break to announce the transaction. Second, Fischer and the cover page to the Form Letters states that the purchase price in this transaction is low and “seems to raise red flags.” Each of these items, however, resulted directly from the bona fide, arm’s-length negotiations between the parties rather than from nefarious intent. On the timing of the announcement of the sale, UE issued a statement confirming the deal just two days after the Asset Purchase Agreement was signed.⁹ And the sale price in this transaction was negotiated over the course of many months. UE would have liked to secure a higher price for Station WUEV, but the market for reserved band noncommercial educational stations is very different from (and much more limited than) the market for commercial stations.

Public Notice. The Objections claim that UE failed to notify the public of the proposed sale of Station WUEV. However, UE has complied in all respects with the FCC’s “public notice” on-air broadcast requirements for Station WUEV. Station WUEV followed the exact requirements set forth in Section 73.3580 of the FCC rules for on-air local public notice for the

facilitating the development of the public broadcasting system rather than determining the content of its programming.” *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees, Notice of Proposed Rulemaking*, 87 FCC 2d 716, 732 (1981); *Report and Order*, 98 FCC 2d 746 (1984).

WDCU(FM), 12 FCC Rcd 15242 (MMB 1997).

⁹ The APA in this transaction is dated as of May 15, 2019, *see* Assignment Application at Exhibit 13, and UE announced the deal on May 17, 2019, *see* John T. Martin, “It’s official: UE selling WUEV frequency to contemporary Christian music network,” *EVANSVILLE COURIER & PRESS*, May 17, 2019.

Assignment Application.¹⁰ Upon completing the broadcast of the required public notice announcements, Station WUEV's General Manager contemporaneously signed a Certificate of Compliance, Broadcast Public Notice, a copy of which is attached hereto. This certificate demonstrates Station WUEV's compliance with the public notice rule in all respects.

Completion of Application. Finally, Fischer claims that the Assignment Application, as filed, is incomplete. Specifically, he states that "the section with effected parties and adverse findings [was] NOT attached." It is not clear what Fischer believes is missing. UE and WAY-FM each certified that no adverse findings had been made (*see* Assignment Application at Section II, Question 6, and Section III, Question 8), and WAY-FM completed the "Parties to the Application" section of its portion of the application (*see* Assignment Application at Section III, Question 4.a). Simply put, the Assignment Application includes all required information.

Conclusion. It is obvious that the authors of the Objections feel strongly about Station WUEV, which is a credit to UE's 68-year-long stewardship as FCC licensee of the Station. There is, however, no legal basis for denying this assignment application, as there is no substantial and material question of fact which shows that assignment of the WUEV license would be contrary to the public interest, convenience and necessity. UE respectfully requests that the FCC promptly deny the Objections against the Station WUEV Assignment Application and grant the application.

Respectfully submitted,

UNIVERSITY OF EVANSVILLE



By _____

Derek Teslik
Todd D. Gray
Margaret L. Miller
Barry Persh

Its Attorneys

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Suite 226
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July 16, 2019

¹⁰ Section 73.3580(e) of the FCC rules provides that publication by broadcast for noncommercial educational stations is sufficient – newspaper publication is not required.

DECLARATION OF KIM MCDONALD

1. My name is Kim McDonald. I am the General Manager of radio station WUEV and an employee of the University of Evansville, licensee of Station WUEV, Evansville, Indiana.
2. The factual statements made in the foregoing opposition to Informal Objection are true and correct to the best of my knowledge and belief.
3. I prepared the attached Certificate of Compliance, and it accurately reflects WUEV's broadcast of public notice of the proposed assignment of the station's license.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 11, 2019

By: Kim McDonald
Kim McDonald
Title: General Manager

**CERTIFICATE OF COMPLIANCE
BROADCAST PUBLIC NOTICE**

I hereby certify that notice of the filing of the application for the voluntary assignment of broadcast license of WUEV(FM), Evansville, Indiana, from University of Evansville to WAY Media, Inc., has been accomplished in the manner prescribed by Section 73.3580 of the Federal Communications Commission's Rules.

The notice was broadcast on the station on the following dates and times:

June 5 1:45 p.m.

June 7 10:52 a.m.

June 8 9:37 a.m.

June 10 3:41 p.m.

Attached hereto is a copy of text of the notice as broadcast over the station.

Signature: Kim McDonald

Name: Kim McDonald

Title: General Manager, WUEV

Date: 6/10/19

PUBLIC NOTICE

On May 28, 2019, an application was filed with the Federal Communications Commission requesting consent to the assignment of the license of WUEV(FM), Evansville, Indiana, from University of Evansville to WAY Media, Inc.

The officers and trustees of University of Evansville are: Randall Alsman, Michael Austin, Alfonzo Baity, Roger Beck, Curt Begle, Ondra Berry, Edward Brown, Forrest Brumbaugh, Wilfred Bussing III, Henrietta Chubb, Bradley Coomer, Derek Dunigan, Philip Eykamp, Andrew Goebel, Stephen Harkness, Paul Jones, Robert Jones, Douglas Kanet, Kevin Koch, McKenna Lewis, Rose Mays, Sara Miller, Christopher Pietruszkiewicz, Barbara Price, Marian Purdue, Larry Rascoe, Sr., Sally Rideout, Anita Horn Rizek, John Schroeder, Arthur Shoener, Annie Stenftenagel, Brent Sternberg, Donna Teague, Christopher Traylor, Julius Trimble, Nathan Wallisch, Linda White, and Steven Worthington.

The officers and board members of WAY Media, Inc. are Robert Augsburg, Joe Battaglia, Andy Bursall, Ash Greyson, Neal Joseph, Mark Maxwell, John Scaggs, Curt Swindoll, Kurt Leander, and Nancy Overfield.

A copy of this application and related materials are available for public inspection at www.fcc.gov.

CERTIFICATE OF SERVICE

I, Derek Teslik, communications counsel for the University of Evansville, hereby certify that on this 16th day of July 2019, I sent a true and correct copy of the foregoing Opposition to Informal Objections by first class mail (or email, where indicated) to the following:

Tom Varner
PO Box 127
Sorento, IL 62086

S. Tom Fischer
9844 Crestview Place
Newburgh, IN 47630

collegeradiopetition@gmail.com (by email)



Derek Teslik