



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

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In Reply Refer to
1800B3-AR

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In re: **WUEV, Evansville, Indiana**
Facility ID No. 69106
File No. BALED-20190528AAM

**Application for Assignment of License
Informal Objections**

Dear Counsel and Objectors:

We have before us the above referenced application (Application) for Commission consent to the proposed assignment of the license for noncommercial educational (NCE) Station WUEV, Evansville, Indiana (the Station), from University of Evansville (UE) to WAY Media, Inc. (WAY).¹ Also before us are Informal Objections filed by: Tom Varner on June 10, 2019 (Varner Objection); S. Tom Fischer on June 28, 2019, (Fischer Objection); and Ashley and University of Evansville Students on June 28, 2019, (A & S

¹ See FCC File No. BALED-20190528AAM.

Objection).² On July 16, 2019, UE filed an Opposition (Opposition).³ For the reasons below, we deny the Objections and grant the Application.

Background. Currently, WAY holds NCE radio station licenses in Texas, Colorado, Kansas, Kentucky, Tennessee, Florida, Georgia, and Alabama.⁴ On May 28, 2019, UE and WAY jointly filed the Application, which was accepted for filing on May 29, 2019.⁵

Varner contends in his Objection that: 1) grant of the Application will result in the loss of jazz, rap, and children's programming; 2) UE did not give public notice of the sale and Application; 3) UE waited until the summer break to announce the sale in order to exclude students from voicing concerns; and 4) UE failed to consult alumni and students prior to selling the Station.⁶

In his Objection, Fischer argues that: 1) WAY already has a frequency in Evansville, so the transfer will create station redundancy while also eliminating jazz, blues, rap, and children's programming; 2) UE did not give public notice of the sale and Application, or of the FCC comment period; 3) the Station staff censored students from discussing the transfer on air; 4) the low sale price of \$150,000 raises red flags; 5) UE waited until the summer break to announce the sale in order to exclude students from voicing concerns; and 6) the Application is incomplete because it does not include additional information related to affected parties and adverse findings.⁷

In their Objection, A & S assert that: 1) the low sale price of \$150,000 raises red flags; and 2) UE did not give public notice of the Application.⁸

In its Opposition, UE counters that the Objections should be denied because: 1) the Commission does not scrutinize or regulate programming, or consider potential changes in programming formats;⁹ 2) the Commission has never dictated business negotiations among parties;¹⁰ 3) both the timing of the sale and the sale price were the result of an arm's length transaction and factors outside of UE's control;¹¹ 4) UE complied with FCC's public notice on-air broadcast requirements;¹² and 5) the Application includes all required information.¹³

² The Commission received numerous form objections from UE students. We will send a copy of this disposition to the students at the email address provided in their objection. Collectively, the Varner Objection, Fischer Objection, and A & S Objection will be referred to as the Objections. Varner, Fischer, and Ashley and Students (A & S) will be referred to as the Objectors.

³ UE Opposition dated July 16, 2019.

⁴ See Application, Attachment 16.

⁵ See *Broadcast Actions*, Public Notice, Report No. 29533 (Jul. 22, 2019).

⁶ Varner Objection at 1.

⁷ Fischer Objection at 1-2.

⁸ A & S Objection at 1.

⁹ Opposition at 2.

¹⁰ *Id.* at 3.

¹¹ *Id.*

¹² *Id.* at 3-4.

¹³ *Id.* at 4.

Discussion. Section 310(d) of the Communications Act of 1934, as amended (the Act),¹⁴ requires the Commission to determine whether the proposed assignment of a broadcast license would be in the public interest. Pursuant to section 309(d)(1), informal objections, like petitions to deny, must 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 the public interest, convenience, and necessity.¹⁵

Public Notice. Section 73.3580 of the FCC's Rules provides that Applications for assignment of a license are subject to local public notice requirements.¹⁶ When the station in question is a NCE station, announcements in accordance with the Commission's standards broadcast over that station shall be deemed sufficient to meet the notice requirements.¹⁷ Applicants who file assignment applications shall broadcast the notice over the station at least once daily on four days in the second week immediately following filing the application.¹⁸ The Application detailing the proposed assignment was accepted for filing on May 29, 2019, and later announced via *Public Notice* on July 22, 2019.¹⁹ In its Opposition, UE provided a "Certificate of Compliance, Broadcast Public Notice," signed by the Station's general manager, detailing on-air announcements on June 5, 2019, June 7, 2019, June 8, 2019, and June 10, 2019.²⁰ We find that UE complied with section 73.3580.

Format Changes. The Varner and Fischer Objections raise various format concerns including content censorship, loss of children's programming, and loss of jazz, blues, and rap music. As the Station's licensee, UE has authority to determine programming policies. The Bureau appreciates that the Station's programming has attracted a devoted listenership. However, it is well-settled policy that the Commission does not scrutinize or regulate programming, nor does it take potential changes in programming formats into consideration in reviewing assignment applications. In 1976, the Commission issued a Policy Statement in which it concluded that review of program formats was not required by the Act, would not benefit the public, would deter innovation, and would impose substantial administrative burdens on the Commission.²¹ The Supreme Court of the United States has upheld this policy.²² In doing so, the Court accepted the Commission's findings that "the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters . . ." and that a change in programming is not a material factor that should be considered by the Commission in

¹⁴ 47 U.S.C. § 310(d).

¹⁵ 47 U.S.C. § 309(d)(1). *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); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864, para. 6 (1986).

¹⁶ 47 CFR § 73.3580(a).

¹⁷ *Id.* § (e).

¹⁸ *Id.* §§ (d)(3)(i) and (f).

¹⁹ *See supra* note 5.

²⁰ Opposition at 3-4 and 5-6.

²¹ *See Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 FCC 2d 858, 865-66, para. 21 (1976), *recon. denied*, Memorandum Opinion and Order, 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).

²² *FCC v. WNCN Listener's Guild*, 450 U.S. 582 (1981).

ruling on applications for license transfer.²³ This is particularly so with regard to the programming decisions of NCE broadcast stations, based on the Commission's historically "limited role of facilitating the development of the public broadcasting system rather than determining the content of its programming."²⁴

Sale Price. Fischer and A&S maintain that the Station was sold for a low price that "raised red flags." The Commission does not examine the purchase price in a station sale unless it appears from other facts that the arrangement may not have been an arm's length transaction between the parties.²⁵ The Objectors offer no evidence or support for this allegation, nor do they allege that the transaction was conducted at anything less than arm's length, whereas, UE contends that the transaction took place following bona-fide arm's length negotiations between the parties.²⁶ UE also responded that it would have preferred to reach a higher purchase price, however, the market did not allow for a higher price.²⁷

Transaction Timeline and Public Involvement. Varner argues that UE excluded students and alumni from the decision to sell the Station. Both Varner and Fischer contend that UE waited until the summer to finalize the sale, in order to prevent the students from objecting to the Application. However, the Objectors offer no evidence to support these claims, and we find that they raise no substantial and material question of fact, calling for further inquiry at this point. Moreover, the fact that numerous students contributed to the A & S Objection contradicts the Varner and Fischer assertion that students did not have the opportunity to object to the Application.

Redundancy of Station Licenses. Fischer alleges that allowing WAY to operate a second station in the Indiana market would cause redundancy of the public airwaves. The Commission's local radio ownership limits do not apply to NCE FM stations.²⁸ Furthermore, WAY's existing Charlestown, Indiana station, WAYI(FM), is not an NCE station. The Objectors have not offered any evidence to support this claim, and they fail to raise a substantial and material question of fact, calling for further inquiry at this point.

Application Status. Lastly, Fischer asserts that UE's Application is incomplete because it failed to include attachments related to affected parties and adverse findings. In the Application, UE certified that there were no adverse findings against it or any of its principals.²⁹ Accordingly, UE is not required to provide information related to adverse parties. Additionally, the Application's "Parties to the Application" section is complete.³⁰

²³ *Id.* at 585.

²⁴ *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, Notice of Proposed Rule Making, 87 FCC 2d 716, 732 (1981). See also *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401, para. 7 (1993) (licensees have broad discretion over programming decisions).

²⁵ *Applications for Assignment of License/Transfer of Control of Television Stations WTTE(TV), WNUV(TV), and WTAT(TV)*, Letter, 19 FCC Rcd 3897 (2004).

²⁶ Opposition at 3.

²⁷ *Id.*

²⁸ 47 C.F.R. § 73.3555(f).

²⁹ Application, section II, question 6, and section III, questions 4a and 8.


³⁰ *Id.*

Conclusion/Actions. For these reasons, we find that the Objectors have not raised a substantial and material question of fact warranting further inquiry. We have reviewed the Application and find that UE is qualified to assign, and WAY is qualified to hold, the station license, and further find that grant of the Applications is consistent with the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, that the Informal Objections submitted by Tom Varner, S. Tom Fischer, and Ashley and Students ARE DENIED.

IT IS FURTHER ORDERED, that the application for approval to assign the license for NCE Station WUEV, Evansville, Indiana (BALED-20190528AAM) from the University of Evansville to WAY Media, Inc. IS GRANTED.

Sincerely,


Albert Shuldiner
Chief, Audio Division
Media Bureau

cc:

Ashley and Students
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