

SUMMARY PER § 1.49(c)

Petitioner Carol MacKinnon files this Petition to Deny in connection with the proposed assignment of KPLU(FM) from Pacific Lutheran University (“PLU”) to the University of Washington (“UW”). The Petition requests that the Commission deny the proposed assignment because it is a prohibited contingent application, which anticipates the filing of an entirely new assignment application, within a period of a few months. The new application will entirely supersede the existing one, because it will include a new assignee with a new governance structure and governing board.

For the Commission to process the present assignment application will waste precious Commission resources and impose an unwarranted burden on the Commission staff. In addition, such processing will divert the Commission staff from processing meritorious applications that are ripe for review and grant. 47 C.F.R. 73.3517 allows the Commission to defer processing any application when such processing would be contrary to sound administrative process.

The Petitioner alleges that the proposed transaction also violates portions of the Communications Act requiring the governing boards of public broadcasting licensees to conduct public broadcasting business in public session and to provide advance public notice to allow public participation. PLU and UW’s failures in this regard has been made subject of a complaint to the Corporation for Public Broadcasting. The FCC properly should defer acting on the instant application until CPB can investigate and specify appropriate curative actions.

In addition, the current application does not meet the public interest requirements of the Communications Act of 1934, as amended. The Petitioner alleges that PLU and UW, despite their federally mandated explicit duties, have engaged in an elaborate and deliberate pattern of seeking to circumvent notice to the public and public participation in this transaction, calling into

question the suitability of their character to be licensees. The secretive conduct fundamentally implicates the Commission's public interest obligations to regulate the conduct of broadcast licensees who are also publicly supported broadcasters and recipients of federal funds from the CPB.

Important policy issues such as the nature of the public interest with respect to financial transactions involving public radio stations, also are raised for the Commission's consideration. The Congressionally mandated requirements for public notice and public meetings, are part of the Communications Act, which also houses all of the authority and obligations mandated to the FCC. Even if the FCC does not have direct enforcement authority over CPB's statutory obligations, the FCC should not frustrate Congressional intent, by refusing to assist CPB in the proper exercise of its statutory authority related to public broadcasting.

Petitioner additionally urges that this transaction is not in the public interest because it means the loss of an independent news source in the geographically large and disparate community served. Petitioner requests that the Commission designate these substantial and material issues pertaining to the public interest for hearing, pursuant to section 309(d) of the Communications Act. Designation for hearing is requested as an alternative to a prompt denial or deferral of action.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

Pacific Lutheran University,)	
<i>Assignor</i>)	
and)	
)	
The University of Washington,)	
<i>Assignee,</i>)	
)	
For: Assignment of License of)	FILE No. BALED-20160204AFY
Station KPLU(FM))	
Tacoma, WA and its associated)	
stations and translators)	
_____)	

TO: The Media Bureau

PETITION TO DENY

Comes now, Carol MacKinnon, a “party in interest” within the meaning of 47 U.S.C. § 309(d) (hereinafter, “Petitioner”), and hereby petitions the Federal Communications Commission (“FCC” or “Commission”) to deny the above-captioned assignment of station KPLU (88.5 FM, Tacoma, WA) (hereinafter “KPLU(FM)”) from Pacific Lutheran University (“PLU”) to the University of Washington (“UW”). In the alternative, Petitioner asks that this matter be designated for hearing pursuant to 47 U.S.C. § 309(e). As good grounds in support of this Petition, the Commission’s attention is invited to the subjoined legal memorandum and accompanying Declaration of Carol MacKinnon and Declaration of Jennifer Wing.

Introduction

The Application before the Commission pertains to the transfer of most of the assets of KPLU(FM), one of the oldest noncommercial educational stations in the country, with an

extraordinary fifty-year history of broadcasting excellence and community service. The licensee, Pacific Lutheran University, was itself founded in 1890 and has graduated many thousands of students over its years of operation. Its governing body is the Pacific Lutheran University Board of Regents.¹ KPLU(FM) serves almost the entire geographic area of western Washington from the border with Oregon to (and beyond) the border with Canada, and from the Pacific Ocean (excepting areas blocked by the Olympic Mountains) east into the foothills of the Cascade Mountain Range. The north/south dimension is equivalent to the three full degrees of latitude encompassing the distance from Virginia Beach, VA to Philadelphia, PA (or extending from Cape May, NJ into the Catskills). The longitudinal span is comparable to the range from Assateague Island to Manassas, VA². The KPLU(FM) service area is larger than the states of Connecticut and Rhode Island combined. Petitioner Declaration at ¶ 13.

The University of Washington, which seeks to acquire KPLU(FM), is an agency of the State of Washington.³ UW presently is the owner of public radio station KUOW(FM), that is both a competitor and a collaborator of KPLU(FM).⁴ KUOW's signal covers merely

¹ Information about Pacific Lutheran University is available on its website, www.plu.edu.

² This latter illustration is particularly apt: Assateague Island is not unlike the remote,

² This latter illustration is particularly apt: Assateague Island is not unlike the remote, sparsely-populated sandy Pacific Ocean shoreline near Hoquiam (served by translator 100.9 FM) and the area between the remote Atlantic Ocean shoreline and Manassas, VA incorporates densely populated centers of research, learning, and vibrant culture as well as traditional sprawling suburbia, akin to the Seattle-Tacoma metropolitan area.

³ UW exists pursuant to R.C.W. ch. 28B.20. Its website is www.uw.edu.

⁴ The stations compete in that they both broadcast some of the same National Public Radio content; they collaborate as supporters of cultural events in the community and members of Northwest Public Radio News. KUOW's format is all-news and talk; KPLU(FM)'s is a mix

the immediate vicinity of the Seattle/Tacoma/Bellevue CMSA⁵. The announced result of the transaction before the Commission is to expand the KUOW service area; as a general matter, it will become equivalent to the current KPLU(FM) service area (through use of the translators to broadcast the KUOW signal instead of the KPLU(FM) signal). The Asset Purchase Agreement is an attachment to the Application subject of this Petition to Deny.

Summary of Argument

The Application should be denied because it is premature for several reasons: First, the proposed assignment is contingent upon the failure of another prospective assignment, the sale of the public radio license to a community group currently raising funds to purchase KPLU(FM), something that UW and PLU has each expressly acknowledged takes precedence. Second, there is a material term of the proposed assignment that violates federal law and is subject of a complaint to the Corporation for Public Broadcasting. Third, the Application also should be denied because it is not in the public interest, for a variety of reasons including the fact that all the major newspapers of the Seattle/Tacoma/Bellevue CMSA have editorialized that the subject transaction is contrary to the public interest because it means the loss of KPLU(FM) as an *independent* news source. Finally, the PLU/UW transaction was so cloaked in secrecy, in flagrant violation of applicable open meetings laws, that the injury to the public interest can only be rectified by rejecting PLU and UW's transaction.

of jazz, blues and the news. Upon closing of the deal, KUOW will remain news/talk and KPLU(FM) will be all music.

⁵ Combined Standard Metropolitan Statistical Area.

Preliminary Matters

Standing

Petitioner is a Washington State attorney who resides in the KPLU(FM) broadcast coverage area, and has been a regular listener and financial supporter of the station. See Declaration of Carol MacKinnon in Support of Petition to Deny (hereinafter, “Petitioner Decl.”). As such, Petitioner, qualifies as a party-in-interest; under recognized Commission standards⁶ she has standing file this Petition to Deny, challenging the proposed assignment of KPLU(FM) from PLU to UW.

Timeliness

Section 309(d) of the Communications Act, together with section 73.3584 of the Commission’s Rules,⁷ govern the requirements that must be met by those filing formal petitions to deny, as opposed to informal objections. The Application for Assignment of KPLU(FM) (“Application”) was submitted to the Commission on February 4, 2016; the date of the Commission’s Notice of Acceptance of Filing is February 9, 2015. Petitioner is filing this Petition within 30 days from the time of the Commission's public notice; accordingly, the Petitioner has satisfied the 30-day deadline for filing this Petition.

⁶See Tabback Broadcasting Company, 15 FCC Rcd 11899, 11900 n. 3 (2000), and Maumee Valley Broadcasting, Inc., 14 FCC Rcd 21734 (1999).

⁷ 47 C.F.R. § 73.3584.

Sworn Statements of Specific Facts

Contemporaneously herewith, Petitioner has submitted her own verified Declaration based upon personal knowledge.⁸ She also has submitted the Declaration of Jennifer Wing (hereinafter, “Wing Decl.”) in Support of this Petition. Both Declarations recite specific, and not conclusory, facts supporting the arguments made in this Petition to Deny.

Abbreviated Statement of Material Facts

(The following is an “executive summary” of the facts; please see supporting Declarations for full details and statements of very specific, non-conclusory facts.)

The deal was negotiated in secret. Petitioner Decl. ¶¶ 3 to 7; Wing Decl. *passim*. The PLU governing body’s meeting at which the transaction was considered was closed and there was no information released to the public until almost a month after the PLU Board of Regents’ action. Petitioner Decl. at ¶¶ 5, 10.

PLU has relied upon the exception in 47 U.S.C. 396(k)(4) to justify keeping meetings related to this transaction closed, thereby keeping the approval of the transaction secret until after the UW Board met, at which time a joint press release was issued. Petitioner Decl. ¶ 10.

The notice of the UW meeting did not reasonably or fairly identify the agenda item. Wing Dec. at ¶¶ 2-4; Petitioner Decl. ¶ 7.

Promptly upon learning of the transaction, the public protested. Subsequently UW announced that it was willing to “step aside” for a community buyer. Further negotiations ensued to agree upon suitable language to add to the Asset Purchase Agreement (the version before the Commission incorporates those modifications). The Agreement (Application

⁸See Huddy v. FCC, 236 F.3d 720, 722 (D.C. Cir. 2001).

Exhibit 5) provides for a community group to present a bid for the license to operate KPLU(FM). Should that bid be deemed to materially match the offer made by UW, the community group will be permitted to purchase the license. Petitioner Decl. ¶¶ 8, 11.

An entity named “Friends of 88.5 FM” is presently engaged in a fundraising effort to allow it to match the UW offer (“community buy-out”). “Friends of 88.5 FM” is organized and exists under Washington law, is duly registered to engage in charitable solicitations, and has filed with the Internal Revenue Service an expedited application for 501(c)(3) status. Its capital campaign began after the corporation’s January 13, 2016, formation and as of March 7, reportedly had raised approximately \$2.2 million. Petitioner Decl. at 12.

There is pending before the Corporation for Public Broadcasting a complaint concerning blatant violations of federal law (for example, CPB funds are listed among the assets being retained by PLU). Among other things, Petitioner has asked that CPB take action to preclude the parties from proceeding at this time. Petitioner Decl. at 14.

Argument

I. The Proposed Assignment is a Prohibited Contingent Agreement and Processing Should be Deferred or the Application Should be Returned to the Parties

After the news of the deal between PLU and UW was announced to the community, there was a tremendous outpouring of dissent. *E.g.*, Petitioner Decl. ¶ 8. Subsequently, UW announced that it would stand aside if a community group could raise funds. *Id.* The Asset Purchase Agreement, at ¶ 31 (Application Ex. 5, pdf Thumbnail # 25), provides that PLU and UW agree that PLU may accept an alternative purchase offer on substantially the same terms from a community group between now and June 30, 2016. The community buy-out also is referenced in paragraphs 10.9 and 11.5 (pdf Thumbnail # 18, 19). In other words, the

proposed Assignment put forward by PLU and UW, has not ripened into a final, unconditional agreement because a third party may yet become the ultimate purchaser in substitution for UW. In other words, the Assignment Application is a contingent agreement prohibited under the Commission's rules and policy.

In 1961, the Commission issued a Public Notice in which it explained why it would no longer accept Contingent Applications in the Broadcast Services. The Public Notice Stated as follows:

The Commission's experience has disclosed that the existing policy of accepting 'contingent' applications in the aural broadcast service for construction permits for new facilities and/or major modifications has not been satisfactory. Since no action can be taken on such applications pending removal of the contingency, holding these applications in our pending files does not serve any valid public interest. Moreover, experience has shown that such applications consume appreciable staff time, which could be devoted to the processing of other applications. Since many of these applications must be held for long periods of time, it is usually necessary for the applicants to file substantial amendments when the contingencies have finally been resolved. In view of the foregoing, the Commission has concluded that no additional 'contingent' applications of the type referred to above will be accepted for filing from this date. The Commission will delete Question 3 on Page 1 of FCC Form 301, which relates to the filing of contingent applications, as soon as practicable.

Public Notice 11405 FCC 61-1286, CONTINGENT APPLICATIONS IN THE BROADCAST SERVICES, Adopted: October 25, 1961, codified at 47 C.F.R. § 73.3517.

While this Public Notice was issued in the context of broadcast technical applications, the same rationale applies to Contingent Assignment applications. Such applications, including the proffered PLU-UW Assignment Application should not be entertained. They represent an impermissible waste of Commission staff resources because of complex contingencies that still need to be resolved. Assuming that PLU accepts the offer expected from Friends of 88.5 FM, an entirely new assignment application will have to be filed with the Commission because the new entity will have a governing board entirely different from that of UW. In

addition, the Commission staff will need to determine the eligibility of the new party to serve as a public broadcasting licensee. The Commission has stated plainly at 47 C.F.R. 73.3517, “[w]henver the FCC determines that processing of any application . . . would be contrary to sound administrative practice or would impose an unwarranted burden on its staff and resources, the FCC may defer processing of such application.”

In this particular matter, the prospective third-party purchaser actually exists. Friends of 88.5 FM is a non-profit corporation validly existing under the laws of the State of Washington and is duly registered to engage in charitable solicitations. Petitioner Decl. at 12. According to records on file at the Washington Secretary of State, Friends of 88.5 FM is governed by two directors; one is the current General Manager of KPLU(FM) and the other is the current chair of the KPLU Community Advisory Council. This entity has already raised more than \$2.2 million over an eight-week period. Id.

In short, the Commission should not be wasting the taxpayers’ dollars and neglecting meritorious applications that are ripe for processing, when this one, by its own terms, is not. The Friends of 88.5 FM is well on its way towards having the required \$7 million and any action on this Application should be deferred until at least June 30, 2016, at which time it will be known if the KPLU(FM) listening community is successful in its quest to purchase its beloved station. After all, that is merely less than four months from now.

II. The Assignment Application is Premature because Blatant Violations of Federal Law Have Been Raised Before the Corporation for Public Broadcasting, Which Entity Should Have the Opportunity to Rule Upon the Statutory Requirements that it is Responsible to Administer, Potentially Saving the Commission from a Needless Exercise in Ruling Upon this Petition.

It is beyond doubt that Corporation for Public Broadcasting (“CPB”) funds can only be used for production or acquisition of programming. 47 U.S.C. § 396 (k)(7). Yet, the Asset Purchase Agreement at ¶ 1.2 (pdf Thumbnail #3-4) states as follows:

1.2 Excluded Property. The Assets shall not include the following (“Excluded Property”):

...

(f) CPB Grant Funds. Corporation for Public Broadcasting (“CPB”) grant funds, including Community Service Grant funds, received by Seller as of Closing.

Paragraph 1.1 of the Asset Purchase Agreement (pdf Thumbnail #2) makes it clear that the Seller is retaining all right, title and interest to the Excluded Property, “[t]he Excluded Property as defined in Section 1.2 below is not included in the Assets [transferred by the preceding sentence].”

The face of the Asset Purchase Agreement also plainly states that after the closing, it is UW, and not PLU that will have exclusive control over programming.⁹ After Closing, PLU will not be engaged in any broadcasting. There will be no need to produce or acquire programming and certainly it cannot retain any CPB funds! It is beyond question that all CPB funds must go with the transaction¹⁰ and the fact that these parties would have a clause

⁹ This is necessary because if PLU were to still be involved in such matters, it would violate the rules of this Commission. See Asset Purchase Agreement at ¶ 14 (pdf Thumbnail #20-21), which tracks the requirements of 47 C.F.R. 73.1150.

¹⁰ Theoretically, the CPB could even assert itself to demand disgorgement of a portion of the \$8 million total purchase price being paid by UW, since an argument could be made that

to the contrary in their contract calls into question their suitability to protect the public fisc. This flagrant violation of 47 U.S.C. 396(k)(7), is subject of a complaint sent to the CPB on March 9, 2016. See Petitioner Decl. at ¶ 14 (attaching a copy of that correspondence).

The complaint to the CPB also points out certain violations of the open meetings requirements incumbent upon recipients of CPB grants. See U.S.C. sect 396(k)(4). KPLU(FM) receives CPB grant money and its governing body is required to provide reasonable advance public notice of its meetings at which KPLU(FM) is to be discussed. Id. Since PLU is a private institution, the PLU Board of Regents agreed, as a condition of receiving CPB funds, to open its sessions when KPLU(FM) was on the agenda. No meeting open to the public was ever held by PLU Board of Regents with respect to this transaction. Petitioner Decl. at ¶¶ 5, 10. No notice that the sale of KPLU(FM) was being considered or studied by any PLU Board of Regents subcommittee or the Board itself was ever given to the public. Id. Even the KPLU(FM) Community Advisory Council, whose existence is a requirement of federal law¹¹, was kept in the dark until after the UW Board of Regents had approved the deal previously negotiated by the entity it has hired to manage its existing station, KUOW¹². Petitioner Decl. at ¶ 15; Wing Decl. at ¶ 2. Instead of there being candor with the communities served by KUOW and KPLU(FM), UW and PLU negotiated in utter secrecy and ignored venerable “government in the sunshine” principles that are an essential part of the CPB regulatory framework.

PLU really has no equity in the station that has been self-sufficient for many, many years (and what equity PLU has, is probably fairly represented in the Martin Neeb Center that was built with KPLU(FM) listener donations and that PLU is nonetheless keeping).

¹¹ 47 U.S.C. § 396 (k)(8).

¹² That entity is named KUOW/Puget Sound Public Radio, hereinafter “KUOW/PSPR”.

It is not the CPB open meetings' requirements at issue here: UW also ignored its statutory obligations at the state level.¹³ Instead of notifying the public that the purchase of KPLU was a matter to be discussed at the November 12, 2015, Board of Regents meeting (which meeting was open to the public), UW advertised the agenda item as "KUOW License Assignment and Acquisition". Wing Decl. at ¶ 4. A more misleading description of the true subject can hardly be imagined! Nowhere did the word "KPLU" appear in the UW Board of Regents meeting Agenda. Wing Decl. at ¶ 3.

Petitioner has requested the CPB, who has the responsibility to assure Congress that the federal funds it receives and distributes are handled in accordance with applicable requirements, to investigate these violations. The need for public participation is black letter law.

Funds may not be distributed pursuant to this subsection to the Public Broadcasting Service or National Public Radio (or any successor organization), or to the licensee or permittee of any public broadcast station, unless the governing body of any such organization, any committee of such governing body, or any advisory body of any such organization, holds open meetings preceded by reasonable notice to the public.

47 U.S.C. § 396(k)(4). Here, UW and PLU must have anticipated that the public would be displeased with the transaction, and thinking only of themselves and not the public that they, as license holders, serve, they kept it secret until all necessary Board approvals were obtained. Cloaking this transaction in secrecy was deceitful. That deceit infects the transaction. The proper remedy is to deny (or at least defer) the Application until a community buyer, such as Friends of 88.5 FM, can come forward with a matching offer.

¹³ No state level suit has yet been initiated raising UW's violations of R.C.W. 28B.20.105; but there are community activists who advocate in favor such potential litigation. Petitioner Decl. at 16.

III. The Application Is Not in the Public Interest.

As an initial matter, it is appropriate to address the “Four Part Test”. See Stephen F. Sewell, “Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act,” 43 *Fed. Comm. L.J.* 277, 291-92 (July, 1991) (hereafter “Assignments and Transfers”). Mr. Sewell’s article is quoted and relied upon throughout the discussion of the test under § 309(d) in this section of the Petition.

The first step is to “consider the nature of the allegations of fact.” Facts alleged in the Petition must be specific and must be either matters of which the Commission can take official notice (such as information in its own records and files) or must be supported by an affidavit or declaration of a person with first-hand knowledge. Petitioner has provided Declarations setting forth, under penalty of perjury, the facts of this matter, based on first-hand knowledge of the Declarants. See Petitioner Dec., *passim*. and Wing Decl., *passim*.

The second step is “to determine whether the petition alleges facts that, if true, establish a *prima facie* case that a grant of the application would not serve the public interest.”¹⁴ Even a cursory review of the Declarations discloses specific verities that would establish a *prima facie* case that the application would not serve the public interest. As Mr. Sewell points out in his comprehensive article, “*prima facie* does not mean conclusive. ‘*Prima facie* sufficiency’ means the degree of evidence necessary to make not a fully persuasive case but, rather, what a reasonable fact finder might view as a persuasive case.” Sewell at 291.

Next, the Commission must consider the pleadings and other submissions of the parties to the challenged application, that must meet the same factual standard as the

¹⁴ “Assignments and Transfers,” 43 *Fed. Comm. L.J.* 277 (hereinafter “Sewell”), at 293

Petition. Those facts are then balanced against those alleged by Petitioner, for a Commission determination of whether a “ ‘substantial and material’ question of fact exists.” As Mr. Sewell explains, “a question of fact is considered ‘substantial’ where ‘the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for.’ *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392 395 (D.C. Cir. 1985).” *Id.*, at 292.

The fourth and last step is “the overall public interest determination” regarding whether the public interest would be served by conducting a hearing. If a “petitioner has raised ‘substantial and material’ questions of fact that, if true, would be inconsistent with the public interest, *the petitioner is entitled to a hearing on its allegations.*” *Id.* (emphasis added). Even if a hearing is deemed not warranted, the Commission must and will issue a written decision with its findings and determinations. *Id.*, at 293.

The Petitioner and Wing Declarations, coupled with the discussion of this Petition, raise substantial and material questions about whether approving the subject transaction would be in the public interest. As discussed next, the nature of the “public interest” determination in the context of this particular license assignment has unique dimensions that cannot easily be set aside.

A. The “Public Interest” in Listener-Supported Publicly-Funded Public Radio Stations Requires More Complex Analysis than in the Commercial Context.

The concept of the “public interest, convenience, and necessity,” is a broad term which encompasses many factors. Those factors must, necessarily, vary with each case that comes before the Commission for such a determination. In the more than eighty years that the

Commission and its predecessor have been ruling on assignments and transfers,¹⁵ it has been called upon innumerable times to determine whether the particular transaction before it would be in the public interest. And, without doubt, in most of those cases, the public interest in these transactions has not been a difficult or complicated determination.

Indeed, the typical “favor-our-format” petition or informal complaint in the context of commercial radio is disposed of without much need for review. For commercial radio stations, formats are a question of market economics. A rational licensee will select or drop a format based upon demographics and ratings, which are directly related to the prices that can be charged for advertising. The public interest is not implicated because, if there is sufficient public interest in a particular format, basic principles of market economics predict that the format will either be preserved or will be picked up by another station in the same market. If a format lacks sufficient interest, then the invisible hand of the market will do away with it. For that reason, the Commission is generally reluctant to rule on issues of program content.

With respect to listener-supported public radio stations, however, the economics and the dynamics are different – and so, too, is the public interest determination. “Listener-supported” is more than a slogan and means something much more specific than a bumper sticker on the listener’s automobile that reads “I {HEART} KPLU!” In the context of public radio, “listener support” means that the people who listen to the station actually provide financial support, in the form of pledges and annual “membership” payments to keep the station and its unique format (whatever that format may be in a particular case) on the air. Without financial support from its listeners, without those sometimes-annoying and

¹⁵ Sewell, at 389 (“ . . . acting upon assignment and transfer of permits and licenses . . . since 1927”).

easily-lampooned pledge drives, a public radio station could not survive today, even with underwriting support and government grants. Public radio supporters “vote” for formats with their membership pledges and checkbooks, as KPLU(FM)’s listeners and supporters do (and as do listeners of other public radio stations in the Seattle/Tacoma/Bellevue CSMA, such as “classical KING-FM” and KUOW-FM (the all talk/news station already owned by UW)).

Likewise, another financial pillar of public broadcasting since the late 1960s has been the Community Service Grant (“CSG”) system, administered by the Corporation for Public Broadcasting pursuant to the terms of the Public Broadcasting Act.¹⁶ As the Commission is aware, these CSGs are federal funds that have been “filtered” through CPB to insulate the stations who receive these grants from government pressure or control. The statute mandates only a few specific conditions that CPB must place upon recipients of these funds. Each of these conditions relate to the essentially *public* nature of the stations receiving support and the *public* derivation of the funding. That is, under section 396(k)(4), the decision-making process by the governing boards and advisory boards of these stations must take place in the public eye. The meetings must be open, advance public notice of those meetings must be provided,¹⁷ and the station’s annual financial and audit reports¹⁸

¹⁶ Pub. L .No. 90-129, 81 Stat. 365 (1967), codified, as amended, at 47 U.S.C. §§ 396 *et seq.*

¹⁷ 47 U.S.C. § 396(k)(4). An annual certification of compliance with this statute is part of the Certificate of Eligibility forms sent annually by CPB to each grant recipient. Information regarding CPB’s Open Meetings Requirements is provided on CPB’s website, at www.cpb.org/about/corp/certification/certreq2.html.

¹⁸ 47 U.S.C. § 396(k)(5).

must be provided to those members of the public who seek access, in much the same manner as the Rule 73.3527 requires NCE stations to maintain public inspection files.

PLU and UW are both public radio licensees whose operations and growth has been funded in large part through CSGs and direct listener support¹⁹. When such licensees make deals in secret, behind closed doors, involving the fate of a radio station that has received long-term listener support, the nature of the public interest determination cannot avoid an inquiry into the stewardship and accountability records of the licensee who received that financial support²⁰. Accounting must be made by the licensee to the public that has supported these stations, that has provided the capital that permitted the stations' growth, and that provided funds to pay operating expenses. How else can such accountability occur, in the absence of open meetings and public notice, except through the Commission's process for making determinations regarding the public interest in such a transaction? Neither the Commission nor the parties to this transaction can escape the fact that compliance with this statute by publicly-funded CSG recipients directly implicates the public interest. Because the listeners and area residents who protest this sale on public interest grounds, including violation of federal laws and FCC rules, are in a very real sense the members of the public whose financial and other interests are adversely affected by this transaction, the public interest determination here must include serious consideration of the failure of the parties to provide notice, hold public meetings, or give notice of the potential sale to local donors and

¹⁹ KPLU has been the recipient of annual CSGs, ranging from \$7500 in the early 1970's through over \$400,000 a year more recently. The residents of Tacoma provide financial support, indirectly but just as surely, to KPLU through their federal tax dollars.

²⁰ It is undisputed that the meeting at which the PLU Board of Regents considered and voted on this transaction was not open to the public. This has been admitted by Assignor. Petitioner Decl. at 10.

contributors²¹. These issues, which directly affect the *public interest as made specific with respect to public radio stations by the Public Broadcasting Act*, require further exploration by designation of this Assignment Application for hearing.

It is susceptible of official notice that the Commission approves, on average, perhaps as many as 1000 assignment and transfer applications per year, particularly over the past decade. During that period, it is probable that few, if any, such applications have been denied on public interest grounds. In most cases, the test is easily applied and no issues are even presented for resolution. If, however, the public interest standard is to have any meaning, it should be applied with real scrutiny when cases arise that present underlying facts and policies that require a much closer look, rather than with a rubber stamp. In such cases, the Commission should examine the transactions in question more closely to determine whether the public interest, as implicated in that particular case, is indeed being served. It is to those public interest aspects of this particular case that Petitioner now turns.

B. The Loss of the Independent News Source Harms the Public Interest.

At present, UW's station KUOW-FM has its own news staff.²² KUOW is managed by a non-profit corporation appointed by UW to manage the day to day business of the station, in part to help protect the public interest in there being independence of the newsroom. Petitioner Decl. at ¶ 11. Nonetheless, UW remains in ultimate control of the

²¹ As discussed in section II, above, the purchase agreement for the sale of KPLU to UW was negotiated in the utmost of secrecy; station management and staff, PLU faculty and students, and the local community were kept in the dark.

²² UW intends to enlarge this staff somewhat to cover the expanded territory for which it will be responsible if the application is approved. See Applicant's Request for Waiver of Station Rule, *passim*.

content and programming of KUOW and UW is an agency of the State of Washington. Thus, KUOW news personnel can never be truly independent because ultimately the station is an instrumentality of the government. Delegation of management authority to KUOW/PSPR merely helps to create a public perception of independence²³.

KPLU(FM) presently has a news staff of 16 persons. Petitioner Decl. at ¶ 11. KPLU(FM)'s website also reflects a long list of awards won by the news team. The 2014 Annual Report contains a laudatory letter by PLU President Krise, extolling KPLU(FM)'s newsroom. In the event that Friends of 88.5 FM succeeds in their quest of purchase the station, KPLU(FM)'s news team would remain as they are now: independent of editorial control by any government.

It is because of the excellence of the KPLU(FM) newsroom and the importance of independent local news sources, and the advantage of a multiplicity of news sources in a community, that the local newspapers have editorialized against the transaction before this Commission. Instead they have all urged that the community be allowed to purchase the station because *that is in the public interest*. The editorials from Tacoma's News Tribune, Seattle's Times, and Everett's Herald are exhibits to Petitioner's Declaration. If a community's major daily print newspapers each editorialize that the transfer of the license to UW is against the public interest, the Commission should take notice. Who else is better positioned to have his/her finger on the pulse of the community? Who else besides a free and independent press has a greater depth of knowledge and understanding of the needs of the full community?

²³ This is a specific finding made by a University of Washington Board of Regents Subcommittee in May 2000 when studying options going forward with respect to KUOW. See also Petitioner Decl. at ¶ 15.

With fewer reporters, there's less news. Pardon the sarcasm, but it's remarkable how much less scandal there is in government and the corporate world now that fewer journalists are on the lookout for it.

The Web creates an illusion of abundant news. There is in fact an abundance of commentary about the news;

Original reporting ... is getting especially tough to come by on the local and regional level.... News is the oxygen that a healthy democracy breathes. Citizens who feel uninformed about local issues and candidates often don't vote.

Less new is bad news for the Puget Sound region.

The News Tribune, 11/29/2015 (Exhibit CM-4).

If the sale goes through, KPLU's newsroom would close. Some journalists might end up at KUOW, but there's no ironclad commitment. And the growing region would lose a vital voice in civic affairs.

The loss of those journalism jobs is significant in the big picture. Upheaval in the business model of mainstream media has resulted in waves of consolidation and downsizing. While new online media voices are emerging, the overall trend is stark.

The loss of KPLU as an independent news voice would add a depressing coda to that downward glide path.

Seattle Times, 12/30/2015 (Exhibit CM-5).

While there is some overlap of national NPR programming, the station's local news operations are separate. The loss of KPLU's news division would be noticeable throughout the state and the Northwest. Compared to the hour of local daily talk programming and short news segments during NPR broadcasts that KUOW offers, KPLU is a major provider of quality journalism.

...

Listeners of KPLU should support the [fund] drive, but anyone interested in preserving a vital source of local journalism should help as well.

Daily Herald (Everett), 12/18/2015 (Exhibit CM-6). In short, the positions of these editorial

boards establish *ipso facto* that the Assignment is contrary to the public interest and the

Application should be summarily denied.

This is not a change in format case. This is about the loss of an independent press²⁴. This is about moving from two public radio news organizations to one, where the territory being served by these non-commercial news organizations is the geographically gigantic entirety of Western Washington, from the Cascade Mountains to the Pacific Ocean and from Oregon to Canada, and the resulting merged organization is under the control of a state agency! Such an outcome flies in the face of the values sought to be protected through the regulatory scheme that Congress has entrusted the Federal Communications Commission and Corporation for Public Broadcasting to oversee.

C. The Assignor and Assignee have engaged in a pattern of not involving the public and should not be trusted to involve the public in the future.

As the Commission well knows, 47 U.S.C. 308(b) and 1990 Character Policy Statement, 5 F.C.C.R. at 3252, render it appropriate to examine the suitability of sellers and buyers to hold a broadcast license, a special privilege in our democracy and one which must be undertaken only by persons who merit the public's trust. Contemporary Media, Inc. v. FCC, 214 F.3d 187 (D.C. Cir. 2000) ("Contemporary Media"), *cert. denied*, 532 U.S. 920, 121 S.Ct. 1355 (2001) (addressing at length the FCC character policy).

In the particular matter at hand, the evidence that Seller has not adhered to CPB open-meeting requirements has been amply discussed above; Petitioner will not burden the Commission by repeating it here. Petitioner Decl. at ¶¶ 3-5, 10 is incorporated here by reference.

²⁴ Other important programs, such as KPLU's partnerships with local schools and other educational outreach also would be lost. See Exhibit CM-9.

More importantly to this section is the conduct of UW and its agent, KUOW/PSPR. Under Washington State law, UW is required to hold open public meetings when its governing body (Board of Regents) meets. RCW 28B.20.105. Advance public notice of those meetings is required. As noted in the Wing Declaration, no public notice mentioned that acquisition of KPLU(FM) was on the Board's agenda. Rather, the published agenda falsely created the impression the topic of discussion was the University's own radio station, KUOW. The agenda item stated, "11. KUOW License Assignment and Acquisition."

The misleading notice is not the only act that reflects poorly upon UW's suitability to hold an additional broadcast license. A look at how it manages KUOW is in order.

First, there is no community advisory council for KUOW. Nor is one required²⁵, although some public universities that are licensees and recipients of CPB funds do take the extra step of having a community advisory council that holds open public meetings although none is required. Instead, UW has formed a non-profit corporation to manage KUOW. That corporation, unlike UW Board Subcommittees, is not subject to state open public meetings laws.

Second, because UW has elected to manage its station through an entity that is not subject to public meeting laws, that entity's Board of Directors was able to meet and consider the matter of UW purchasing KPLU(FM) without the public knowing about the discussion²⁶. This meeting and approval took place on September 17, 2015, almost a month

²⁵ See 47 U.S.C. §396(k)(8)(A) excepting stations owned and operated by a State, a political or special purpose subdivision of a State, or a public agency from the need for a community advisory council.

²⁶ Upon information and belief, CPB grants are received by UW and not directly by KUOW/PSPR, which merely manages pursuant to a contract with UW and therefore the

before the PLU Board of Regents took up the matter, and two months before UW's Board of Regents considered it.²⁷ This is a very long time to hide the planned transaction from the public.

Third, although the KUOW/PSPR is not controlled by UW and its governing Board includes members of the public²⁸, it failed to recognize that the transaction it was discussing might implicate the larger interests of the western Washington community. Indeed, it seems that the entire purpose of the KUOW/PSPR is to protect the station from the nuisance of being subject to all sorts of rules and regulations that apply to a public agency such as UW. See Petitioner Decl. at ¶ 15 (referencing a public record of which this Commission may take judicial notice). If this aim to protect station operations from the inconvenience of being subject to regulations applicable to state agencies is truly the culture of UW's management of its radio station, then it is dubious that UW can be trusted to protect the KPLU listening public and financial supporters in the future²⁹.

Fourth, even a simple Google search discloses that UW is frequently accused of violating state open meeting laws. This is not to contend that such hearsay allegations are

exception in 47 U.S.C. § 396(k)(8)(A), on the face of things, applies. Arguably, however, the spirit of CPB regulations being circumvented by this structure.

²⁷The UW Board of Regents approval was most likely a rubber stamp of the recommendation of the Finance and Asset Management Subcommittee, which took the matter up on the morning of the full Board meeting. According to the Finance and Asset Management Subcommittee agenda, the "KUOW License Assignment and Acquisition" was one of thirteen substantive items considered during a meeting scheduled for 2.5 hours. Petitioner Decl. at ¶ 7.

²⁸ The Board is "self-perpetuating" in that the community members are selected privately by the members wishing to retire.

²⁹ Some members of the public have complained that KUOW "pleads poverty" in its fund drives, but somehow has managed to amass a reserve that is reported to be \$4 million. Petitioner Decl. at ¶ 18.

necessarily true (although courts have ruled against UW in various contexts), but is mentioned to put the Commission on notice that close scrutiny here may be appropriate. The violations with respect to the one transaction at issue in this proceeding may be part of a persistent pattern of behavior that, if proven, would demonstrate UW perhaps to be unfit to be assigned the KPLU(FM) license.

Fifth, UW (together with PLU) is stretching the law to its limits in order to avoid giving the public a meaningful opportunity to comment on the Application. The Assignor and Assignee have very able and experienced FCC counsel. By filing the Application on a Friday, PLU and UW ensured that the Application could not be accepted by the FCC until the following week; since the legal notification requirement mandates that the public notification be made during the next full week, the *de facto* comment period becomes shorter than the *de jure* period. People who care about the public interest don't do the statutory minimum amount of notice to the public and don't engage in manipulating the timing of filings to limit public participation. PLU also has caused KPLU to broadcast only the minimum number of announcements legally required and the announcement made says only the minimum required, to wit, it does not use the words "public comment period" and does not say anything about a deadline for the public to submit comments to the FCC. Petitioner Decl. at ¶ 9.

Undeniably Congressional intent behind 47 U.S.C. sect 396 is to assure that stations financed with public monies remain accountable to the public in the communities they have been licensed to serve. Open meetings, open records, business carried out in the sunshine rather than behind closed doors – all these factors serve to ensure that public radio and

television stations which receive public funding do not abuse or ignore the interests of the public that provide those funds.

Conclusion

What might have seemed to be a routine Assignment Application plainly is a hornet's nest of legal issues being championed by an outraged and vocal community. The citizens have even obtained the backing of legislative representatives and lobbying continues. The media is reporting on multiple instances of misconduct and respected newspapers are editorializing against the transaction that is before this Commission. The matter at hand raises legal and policy issues regarding the appropriate nature and extent of the public interest, convenience and necessity standard with respect to government-provided funding of public radio and television stations.

Hence, Petitioner urges the Commission to defer action on the Application until CPB has acted upon her complaint and to defer action until the contingency of the community purchase has been satisfied. In the alternative, Petitioner submits the Application should be denied as contrary to the public interest, or the matter should be set for hearing to consider the public interest, including the suitability of Assignee to hold Assignor's license. This transaction will decrease diversity of ownership and viewpoints (which is a particular concern in public broadcasting). This is not an assignment between commercial entities; rather this transaction involves the sale of one public radio station to another public radio

station, a matter as to which the public interest requires a higher level of public accountability and transparency.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Carol MacKinnon, hereby certify that the following document was filed in the FCC CDBS system today, March 10, 2016 and true and correct copies of that document were emailed to the following persons:

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