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

In the Matter of	)	MM Docket No. 96-70
	)	
UNDER HIS DIRECTION, INC.	)	
	)	
Order to Show Cause Why the	)	
License for Station KUHD(AM)	)	
Port Neches, Texas Should	)	
Not Be Revoked	)	

To: Administrative Law Judge
Edward Luton

MASS MEDIA BUREAU'S REPLY TO
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On September 9, 1996, Under His Direction, Inc. ("UHD") filed its Proposed Findings of Facts and Conclusions of Law (PFCs) in this proceeding. The Bureau hereby replies to UHD's PFCs. The Bureau's failure to reply to any particular finding or conclusion contained in UHD's PFCs should not be construed as a concession to its accuracy or completeness. The Bureau submits that its findings of fact are an accurate and complete presentation of the relevant record evidence and that its conclusions of law properly apply Commission precedent in light of the record.

Proposed Findings

2. UHD's findings of fact fail to include critical facts which led to the designation of this case for hearing. For example, at page 2, UHD recites that UHD filed a request for an STA to remain silent on January 6, 1995, in which it stated that KUHD was off the air due to "extreme financial hardship." UHD conveniently does not recite that it also told the Commission that it "expected to return to the air and be operational within 90 days." In

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expectation that UHD would do what it said it would do, the Audio Services Division of the FCC granted UHD's request. See paras. 5 and 6 of the Bureau's findings. KUHD was not returned to the air as promised. Rather, its equipment was seized by creditors and UHD was not able to return the station to the air. See para. 7 of the Bureau's findings.

3. At the top of page 4, UHD proposes findings regarding the contents of its July 26, 1995, request for an extension of its STA to remain off the air. In doing so, UHD fails to note that its request included the claim that it had "obtained an agreement with the mortgage holder of the assets of KUHD(AM) and will be consummating our agreement very shortly." Based on this representation, and the expectation that an application for assignment of KUHD would be filed in the near future (within 30 days), UHD received its extension. See paras. 9 and 10 of the Bureau's findings. As of the date this case was designated for hearing, no such assignment application was filed.[1]

4. At page 5, UHD refers to the Church of the Christian Crusade (CCC) as "reneging on the Conveyance Agreement." What this glosses over is the fact that UHD never had such an agreement with CCC. Although UHD sent an agreement signed by UHD to CCC for its signature, the agreement was never signed by CCC. Thus, there was no agreement for CCC to "renege" on.

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[1] A search of the Commission's files, conducted just prior to designation of this case for hearing, failed to disclose a copy of the promised assignment application. See, para. 15 of the Bureau's findings.

5. At pages 7 and 8, UHD requests that the Presiding Judge take "official notice" that it had filed an application to assign KUHD(AM) to Vision Latina, Inc. ("Vision Latina"). UHD then proceeds to make findings based upon statements contained in the application. Specifically, UHD, citing the assignment application at Exhibit E, asks the Judge to find that UHD had told the Commission that UHD had examined the station's equipment and found it to be in good working order and that it could return the station to the air within sixty days. This proposed finding is not accurate. At Exhibit E, the assignment application states that the "assignee [Vision Latina] has examined the station equipment and found it to be in place and in good working order." The assignment application further states that the assignee (Vision Latina) "believes" that it will be able to make the station operational within 30 days. Thus, it was the assignee and not UHD that examined the station's equipment. In addition to being inaccurate, UHD's proposed finding is not a proper subject of judicial notice. Rule 201(b) of the Federal Rules of Evidence limits judicial notice to facts which are not subject to reasonable dispute in that they are either generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. Thus, matters such as the condition of equipment and an assignee's intent are not the proper subject of judicial notice. The request for judicial notice should be denied.

Conclusions

6. At page 9, UHD cites Blue Ribbon Broadcasting, Inc., 90 FCC2d 1023 (Rev. Bd. 1982) for the proposition that rule violations occurring during a short period of time of financial difficulties and that do not involve misrepresentation, do not warrant revocation of a

station's license. In this regard, UHD notes that KUHD(AM) "had been silent without authorization for only fifty-six days." Blue Ribbon, however is inapposite. That case did not involve a station that was off the air. In Blue Ribbon, the Board found that the violations, which were technical in nature, were neither so prolonged nor aggravated as to warrant revocation. Here, UHD has been off the air for over two years and off the air without authority since February 2, 1996.

7. At page 12, UHD claims that, unlike the licensees in Hex County Radio, Inc., 44 RR2d 396 (1978) and David R. Price, 71 RR2d 888 (1992) it did not ignore communications from the Commission concerning KUHD(AM)'s status. Hex, however, is inapposite. In Hex, the Commission refused to reconsider its decision declaring a license forfeit. Thus, unlike the instant case, Hex did not involve a licensee that had been designated for hearing. The Price case, which dealt with tower lighting, is also inapposite.[2] In the instant case, UHD has been given notice in the HDO that its license is subject to revocation and an opportunity to be heard as to why its license should not be revoked.

8. At page 12, UHD cites Video Marketing Network, Inc., 10 FCC Rcd 7611 (MMB 1995), for the proposition that the Bureau has approved assignments of license where the licensee's rule violations were far more extensive and egregious than those in this case. In Video Marketing, however, the licensee had recommenced broadcasting and affirmatively

[2] In Price, the licensee failed to illuminate six radio towers for five straight months. Aggravating the situation was the tower's close proximity to an airport.

acted to correct all deficiencies. For various rule violations, a forfeiture in the amount of $20,000 was imposed. In Video Marketing the Bureau warned licensees that failure to notify the Commission of their station's silence status "will come under increasingly close scrutiny as we continue our efforts to ensure the prompt resolution of difficulties preventing the provision of licensed broadcast service to the public (fn. deleted)." The instant case is part of the Bureau's increased scrutiny of those situations where licensed broadcast stations have ceased to provide service to the public.

9. At page 14, UHD cites Mark R. Nalbone, Receiver, 6 FCC Rcd 7529 (MMB 1991), for the proposition that remaining silent without authorization for six months does not warrant loss of license. In Nalbone, however, the station was in receivership and the receiver had returned the station to the air. Thus, in Nalbone, there was no question of the licensee's capability and intent to expeditiously resume broadcast operation as exists in the instant case. Consequently, Nalbone, is inapposite.

10. At page 13, UHD contends that the Bureau has offered no explanation for its failure to process UHD's application to assign KUHD to Vision Latina in accord with its May 28, 1996 Public Notice. The Bureau, through proceedings such as this, has informed applicants that the 1996 Public Notice does not apply to licensees of silent stations that have been designated for hearing.

Summary

11. In sum, the Bureau recommends that the Presiding adopt its proposed Findings of Fact and Conclusions of Law and revoke the license of UHD to operate KUHD(AM), Port Neches, Texas.

Respectfully submitted,
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September 30, 1996

CERTIFICATE OF SERVICE

Natalie Moses a secretary in the Hearing Branch, Mass Media Bureau certifies that she has on this 30th day of September 1996, sent by regular United States mail, copies of the foregoing "**Mass Media Bureau's Reply to Proposed Findings of Fact and Conclusions of Law**" to:

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