

I. Introduction and History

A. Selling College Radio Stations

On December 5, 2010, the *New York Times* ran an article titled “Waning Support for College Radio Sets Off a Debate.”¹ The article brought to national attention the problem of universities selling their college radio stations, notably addressing the recent controversies surrounding the sale of Rice University’s KTRU and Vanderbilt University’s WRVU. Since the article was published, Vanderbilt has not solidified any sale of its station. However, Rice University has continued with a sale marred by secrecy and controversy, and is currently waiting for the FCC to approve the license transfer that would allow the University of Houston to take over the frequency, turning KTRU into a classical music KUHC and the University of Houston’s current station KUHF into a 24-hour NPR station.²

Opponents of the sale have provided many reasons for their anger about and opposition to the sale. On the student and alumni side, Rice University has not provided any formal study justifying the sale and sold the station without discussion with the students and alumni who created and managed the station.³ The resulting sale will eliminate a source of media and broadcast education for students and will destroy a link with the surrounding city, local art establishment, and minority community, all contrary to the university’s previously stated goals.⁴

¹ John Vorwald, *Waning Support for College Radio Sets Off a Debate*, THE NEW YORK TIMES, Dec. 5, 2010, available at <http://www.nytimes.com/2010/12/06/business/medial06stations.html>.

² Chris Gray, *KTRU Sale Now Totally In FCC’s Hands*, HOUSTON PRESS, Dec. 20, 2010, available at http://blogs.houstonpress.com/rocks/2010/12/ktru_sale_now_totally_in_fccs.php.

³ *Save KTRU made it to the New York Times*, BURN DOWN BLOG, Dec. 5, 2010, available at <http://burndownblog.wordpress.com/2010/12/05/save-ktru-made-it-to-the-new-york-times/>

⁴ *BURN DOWN RICE!: Selling KTRU violates V2C*, BURN DOWN BLOG, Aug. 17, 2010, available at <http://burndownblog.wordpress.com/2010/08/17/burn-down-rice-selling-ktru-violates-the-v2c/>

From the perspective of non-student or alumni opponents to the sale, removing KTRU from the airwaves would eliminate a unique, and award winning, source of music that cannot be found elsewhere in the local radio market.⁵ Furthermore, the secrecy of the deal was in potential violation of Texas' Open Meetings Act.⁶

B. How Has the FCC Looked At Selling Radio Stations?

While monetary concerns, misleading university administrators, and musical aesthetics may make for good protest rhetoric, they do not make a cohesive legal argument against the sale of the KTRU frequency. In fact, in its Opposition to the Petition to Deny, Rice University specifically latched onto this framing of arguments against the transfer as programming-related arguments.⁷ From this perspective the Commission's precedent is established: "the Commission does not scrutinize or regulate programming, nor does it take potential changes in programming formats into consideration in review assignment application."⁸

In the past the courts have scrutinized programming out of concern of preserving unique content on the airwaves. In *Citizens Committee to Keep Progressive Rock v. F.C.C.*, the D.C. Circuit stated that it was "in the public interest, as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is ethnically and

⁵ *Ibid.*

⁶ Steve Miller, *KTRU radio station not named in generic Regents meeting agenda; descriptions must be specific under Open Meetings Act*, TEXAS WATCHDOG, Aug. 19, 2010, available at <http://www.texaswatchdog.org/2010/08/-generic-agenda-item-for-regents-meeting-did-not-name-ktru/1282261406.column>

⁷ Rice Opposition at 2.

⁸ *Application for Assignment of License of WQXR-FM*, Letter, 24 FCC Rcd 11761, 11762 (2009).

economically feasible.”⁹ While the court refused to distinguish between types of music — “one man’s Bread is the next man’s Bach” — it held that it was “in the public’s best interest to have all segments represented.”¹⁰ However, since 1977 the FCC has established that it would allow market forces to determine the broadcast station’s format.¹¹ Furthermore, deregulation of the airwaves at the end of the Carter Administration and beginning of the Reagan Administration eliminated the *1971 Ascertainment Primer* and the *Renewal Primer* that the court relied upon in *Citizens Committee*, creating less stringent requirements for license applications and renewals.¹²

While the FCC no longer concerns itself with the content of broadcasts, there is still the question of whether the specter of localism should influence the FCC’s approval of the KTRU sale. In this paper, I will address the concerns of localism as they apply in FCC regulations, and specifically look at Rice University’s recommendation in its Opposition to Petition to Deny that Internet radio over cellular phones serve as an adequate substitute for FM radio.¹³

II. Localism on the Radio

A. How Does Localism Apply?

1. Localism and KTRU

The Commission has in the past recognized localism as an important part of its charge. In its recent Report on Localism, the FCC has called the concept of localism “a cornerstone of

⁹ *Citizens Committee to Keep Progressive Rock v. F.C.C.*, 478 F.2d 926, 929 (D.C. Cir., 1973).

¹⁰ *Ibid.* at 929.

¹¹ *Changes in Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, Docket No. 20682, 60 FCC 2d 858, 863 (1976).

¹² *In the Matter of Deregulation of Radio*, Report and Order, Docket No. 79-219, 84 F.C.C.2d 968, 971 (1981).

¹³ Rice Opposition at 7.

broadcast regulation.”¹⁴ As Friends of KTRU pointed out in its Petition to Deny, this localism mandate extends not just to the availability of a radio signal in a local community, but rather to the ability of that community to transmit issues of local importance over the airwaves and provide “their own media for local expression.”¹⁵ Indeed, the Commission has held that “broadcasters are obligated to operate their stations to serve the public interest — specifically, to air programming responsive to the needs and issues of the people in their communities of license.”¹⁶ From the perspective of FCC rhetoric, KTRU supporters are in a proper position to argue that transferring the license would result in an important loss of local music and media. KTRU programs such as the Local Show, MK Ultra, Vinyl Frontier, Genetic Memory, and the Revelry Report showcase local artists and discuss issues specific to the Houston music community that cannot be found elsewhere on the local airwaves.¹⁷ Furthermore, KTRU also provides minority-oriented programming, such as Navrang, which focuses on music from the Indian subcontinent, and Africana, which focuses on music from the African diaspora. In a city where the Nigerian ex-patriot population totals more than 80,000 and more than 4 percent of the entire city population was born in Asia, these shows provide for the local community in ways that other FM stations do not.¹⁸ As the Commission instructs, “[t]he principle of localism requires broadcasters to take into account all significant groups within their communities when developing balanced, community-responsive programming, including those groups with

¹⁴ Report on Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1234 ¶ 5 (2008).

¹⁵ Petition, citing *Utica Observer-Dispatch, Inc.*, 11 F.C.C. 383, 391-92 (1946).

¹⁶ Report on Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1234 ¶ 6

¹⁷ Petition at 10.

¹⁸ *Ibid.* at 11; Reply to Oppositions at 10.

specialized needs and interests.”¹⁹ These niche shows, with their local DJs, certainly are community-responsive. On the other hand, not one single program will be added to the station after the sale that will be specific to the local Houston community, only adding syndicated and national shows like BBC World News, the Diane Rehm Show, Fresh Air With Terry Gross, BBC World Have Your Say, Talk of the Nation, The World, Beutche Welle Newslink Plus, Tell Me More, and The Story.²⁰ Given the comparison between the station offerings before and after the sale, it seems like the transfer could be denied on localism grounds. However, the Commission has not always applied its ideals of localism in a strict manner.

2. Localism as applied by the FCC and Media Bureau

While rhetoric and written policy by the Commission has emphasized the importance of localism in broadcasting, this importance has not always transferred into enforceable rules. For example, in the case of the assignment of a license of a noncommercial educational station WQEX(TV), a coalition of public-interest groups petitioned to deny the application on the ground that proposed assignee’s broadcasts “would consist almost entirely of sales presentations, with little or no noncommercial local content.”²¹ However, the Commission refused to consider the argument, explaining that “the courts and Commission have repeatedly rejected arguments that would require intrusion into the format choices of broadcast licensees.”²² While WQEX concerned application of television license, the FCC Media Bureau has applied similar rationale

¹⁹ Report on Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1234 ¶ 69.

²⁰ Petition at 12-13.

²¹ *Application of WQED Pittsburgh (Assignor) and Cornerstone Television, Inc. (Assignee) for Consent to the Assignment of License of Noncommercial Educational Station WQEX(TV)*, Memorandum Opinion and Order, 15 FCC Rcd 202, 231 ¶57 (1999), *vacated in part on other grounds by* 15 FCC Rcd 2534 (2000).

²² *Ibid.* at 232 ¶ 57.

to FM radio licenses. In the case of C-SPAN's application for assignment of an FM radio license, some listeners objected to assigning the license because it would change "WDCU(FM)'s current jazz format to a format dedicated primarily to public affairs and news programming."²³ Other objectors argued that the grant of application was not in the public interest "because C-SPAN's proposed national programming does not the problems, needs and interests of the [local community]."²⁴ However, the Media Bureau letter rebutted these arguments, stating that the Commission "has had the appropriately limited role of facilitating the development of the public broadcasting system rather than determining the content of its programming," and that under well-established precedent, rather than having to actually demonstrate how it responds to the community needs, "an applicant is required to provide only a brief narrative description of its proposed community issue-responsive service."²⁵ In the end, the Commission approved the license. Indeed, in a this case concerning sacrificing a music station for news, with similar arguments about localism and public interest, the FCC has made its position clear, leaving KTRU supporters with little legal recourse. However, comparing application in cases with FCC rhetoric still provides a mixed message.

3. FCC Report and Rhetoric on Localism

The FCC's 2008 Report On Broadcast Localism And Notice Of Proposed Rulemaking spends several dozen pages lamenting the problem of a lack of localism in the broadcast

²³ *Application for Assignment of License of WDCU(FM)*, Letter, 12 FCC Rcd 15242, 15244 (1997).

²⁴ *Ibid.* at 15244.

²⁵ *Ibid.* at 15244-15245, citing 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); Request for Declaratory Ruling Concerning Programming Information in Broadcast Applications for Construction Permits, Transfers and Assignments, 3 FCC Rcd 5467, 5467-5468 (1988).

spectrum. Specifically, it identified the problem of broadcasters failing to serve the interests of local communities in developing and promoting local artists and in fostering musical genres.²⁶ The report also addressed the issue of licensees grossly overstating the amount of locally oriented news programming that they offer by including commercials, weather, sports, entertainment, video news releases, and redundancy, with locally produced public affairs programming almost entirely absent.²⁷ Furthermore, the report found that significant groups within communities were not being taken into account by broadcasters when attempting to apply the principle of localism.²⁸

FCC Commissioners have personally expressed concern about trends against localism in the broadcast marketplace. In an address to the Columbia University Graduate School of Journalism, FCC Commissioner Michael Copps lamented the “homogenization and monotonous nationalized music at the expense of local and regional talent,” and proposed a system where a certain percent of programming is locally or independently produced.²⁹ Former FCC Commissioner Rachelle Chong even used her Twitter feed to state support for KTRU and concern about the sale.³⁰ So while past cases may not give much hope to KTRU supporters, FCC reports and statements from past and current commissioners may put enough pressure on the Media Bureau to take a hard look at localism concerns in the license transfer. However, in its

²⁶ Report on Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1234 ¶ 35.

²⁷ Ibid. at ¶ 37.

²⁸ Ibid. at ¶ 69.

²⁹ *FCC’s Copps Proposes Public Value Test for License Renewal*, RADIO, Dec. 3, 2010, available at <http://www.radiomagonline.com/fcc/fcc-copps-public-value-test-license-renewal-1203/index.html>.

³⁰ *Growing opposition to the KTRU sale OR Know Your FCC Commissioners*, BURN DOWN BLOG, Nov. 15, 2010, available at <https://burndownblog.wordpress.com/2010/11/15/growing-opposition-to-the-ktru-sale/>.

Opposition to Petition to Deny, Rice University offered an alternative to assuage concerns about losing a unique and local source on the radio: Internet radio.

B. Is Internet Radio An Adequate Replacement for FM Radio?

In its Petition to Deny, KTRU stated that Web radio is not an adequate alternative to FM broadcast because it is not available in the car. Rice contends that this “ignores the increasing available of Web radio via cell phone.”³¹ However, there are technological, monetary, and legal concerns as to whether Web radio over cell phones can replace FM radio for listeners.

1. Technological and Monetary Concerns

As of a Nov. 2010 report by Canalys, the most popular smartphone in the United States is the Apple iPhone, which has a 26.2 percent share of the U.S. market.³² The iPhone is currently available only on the AT&T network.³³ AT&T’s high use, DataPro plan provides 2GB of data for \$25 per month, and \$10 for every additional 1GB.³⁴ The average radio stream is 128 kilobits per second, equaling 16 kilobytes per second, equaling 57.6 megabytes per hour. By this math, it would take approximately 34.7 hours of listening to the radio per month to exceed the set data allotment by AT&T and incur additional charges. Merely a bit more than one hour of radio via an iPhone per day would use more data than what AT&T foresees in its highest use plan. In a city where the average commute is around 28 minutes, it is not difficult to imagine someone spending

³¹ Rice opposition at 7.

³² Tim Stevens, *Canalys: iPhone becomes most popular smartphone in the US, Android continues as most popular OS*, ENGADGET, Nov. 1, 2010, available at <http://www.engadget.com/2010/11/01/canalys-iphone-becomes-most-popular-smartphone-in-the-us-andro/>.

³³ <http://www.att.com/wireless/iphone/> (iPhone is configured to work only with the wireless services provided by AT&T.)

³⁴ <http://www.att.com/shop/wireless/plans/data-plans.jsp>.

more than 34.7 hours listening to the radio in the car over the period of a month.³⁵ Therefore, in addition to the one-time cost of purchasing an iPhone 4 for \$199, or iPhone 3GS for \$99, a regular KTRU listener would spend \$25 per month to listen in the car, and an avid listener would spend \$35 or more per month, meaning \$300 or \$420 per year. At the high end, this would require the average American to spend 15 percent more on entertainment than the current average annual expenditure of \$2,698.³⁶ This additional spending may be cost restrictive for many listeners. On the other hand, one can buy an FM radio for the one-time cost of \$9.99.³⁷ While Rice University may have an optimistic view about the ability of Web radio over cell phones to replace FM radio, crunching the numbers reveals that the hardware investment and price of use may make access overly cost restrictive for former KTRU fans. Unless the university is willing to help pay for listeners' new cell phone bills, it may have an ill-informed perspective on current Internet costs and availability.

2. Legal Concerns

Even if there were not a monetary restriction on the ability of Web radio to replace FM radio, there is still a concern as to whether the FCC could justify eliminating a local source in the FM spectrum because it is otherwise available in the Internet. The Federal Communications Law Journal argues that inherent scarcity of the electromagnetic spectrum mandates that public interest obligations still remain enforced, stating that “despite the motley of other media outlets available-Internet radio, satellite radio, cable and digital television, and the like-the reason

³⁵ Stephen Ohlemacher, *Believe it or not, average commuting time drops*, HOUSTON CHRONICLE, Aug. 30, 2006, available at <http://www.chron.com/disp/story.mpl/nation/4152068.html>.

³⁶ *How The Average U.S. Consumer Spends Their Paycheck*, VISUAL ECONOMICS, available at <http://www.visualeconomics.com/how-the-average-us-consumer-spends-their-paycheck>.

³⁷ <http://www.amazon.com/Sony-ICF-S10MK2-Pocket-Radio-Silver/dp/B00020S7XK>

underlying such obligations in the first place is still present: electromagnetic spectrum is still scarce.”³⁸ However, unlike various other media sources, radio’s pervasiveness in combination with its scarcity necessitates regulation. Furthermore, a strictly enforced market-based approach will only lead to, and arguably has led to, the creation of technology haves and have nots.³⁹ Indeed, the cost restrictiveness of Web radio emphasizes the public interest charge of the FCC.

However, the FCC has addressed new technology supplanting old broadcasting in the realm of television. Currently, cable systems must carry the signals of local commercial and noncommercial broadcast stations in their local markets, while satellite carriage of local broadcasts is only required in Alaska and Hawaii.⁴⁰ The FCC has expressed concern that in a small group of cases, the system used to define local broadcast stations results in the required carriage of the broadcast signal of an out-of-state station rather than an in-state station, potentially weakening localism.⁴¹ This concern demonstrates that the underpinnings of the must-carry requirements is the protection of localism. If Web radio, or satellite radio, were to serve as an adequate alternative to FM radio, the FCC should first create similar must-carry regulations for telecom providers and satellite radio companies to ensure that localism is not weakened. However, these regulations do not yet exist. Without guarantees of a must-carry provision, the same sort that were imposed on the cable industry as it replaced broadcast television, alternate radio sources cannot serve as a proper guarantors of localism.

³⁸ *Deliberative Democracy on the Air: Reinvigorate Localism - Resuscitate Radio’s Subversive Past*, 63 Fed. Comm. L.J. 141, 188.

³⁹ *Ibid.* at 190.

⁴⁰ Report on Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1234 ¶ 47, 48.

⁴¹ *Ibid.* at ¶ 49.

III. Conclusion

The rise of Internet music and the perceived declining importance of radio, combined with an economic downturn, has led many universities to sell their college radio stations. The plight of Rice University's KTRU has risen to prominence as fans and staff of the student-created and student-run, award-winning station have moved from usual campus protests to legal appeals in an attempt to stop the sale of the station. While FCC publications and commissioners' rhetoric have emphasized the importance of localism, legal precedent does not give KTRU supporters much in the way of support. However, Rice University's recommendation that the Internet serve as a proper alternative does not stand up to scrutiny. Monetary restrictions and lacking must-carry requirements prevent the Web from serving as a proper replacement for FM radio.