

LC03408

# STATE OF RHODE ISLAND

## IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2005

### A N A C T

#### RELATING TO FIDUCIARIES -- PUBLIC RADIO STATIONS

Introduced By: Senators Roberts, Paiva-Weed, and Felag

Date Introduced: June 01, 2005

Referred To: Senate Financial, Technology, Regulatory

It is enacted by the General Assembly as follows:

1           SECTION 1. Title 18 of the General Laws entitled "Fiduciaries" is hereby amended by  
2 adding thereto the following chapter:

#### CHAPTER 4.1

#### THE PUBLIC RADIO CONVERSIONS ACT

5           **18-4.1-1. Short title. --** This chapter shall be known and may be cited as "The Public  
6 Radio Conversions Act."

7           **18-4.1-2. Findings. --** The general assembly finds and declares that:

8           (1) Public radio stations in Rhode Island contribute uniquely and substantially to the  
9 cultural, educational and journalistic quality of life in Rhode Island;

10           (2) Rhode Island's existing public radio stations have been built and maintained through  
11 the charitable contributions of thousands of Rhode Island individuals, foundations and businesses  
12 who expected that their contributions would be used to maintain and improve public radio  
13 stations in Rhode Island;

14           (3) Consolidation in commercial radio and other media has reduced the number of Rhode  
15 Island owned and operated cultural, educational and news organizations;

16           (4) Rhode Island public radio stations are under particular challenge because the lawful  
17 but dominant signal strength and broadcasting priority of television's broadcast channel six limits  
18 the signal strength of virtually all noncommercial radio licenses in Rhode Island, thereby limiting  
19 the technical ability of Rhode Island public radio stations to serve the entire state through a single

1 noncommercial radio license;

2 (5) Public radio stations broadcasting with commercial licenses may easily be sold to for-  
3 profit entities that do maintain public radio programs;

4 (6) Donations to charities are made under a constructive trust that the charity will use the  
5 donations to support the charities' mission as long as the charity and mission are viable; and

6 (7) In order to protect public welfare and public and charitable assets, and ensure that  
7 Rhode Islanders' gifts to Rhode Island public radio stations are used for their intended purposes, it  
8 is necessary to establish standards and procedures that result in recoupment of public investment  
9 and the payment of a conversion fee to create the financial infrastructure to replicate public radio  
10 programming that is bst in public radio station conversions that do not constitute a community  
11 benefit.

12 **18-4.1-3. Purpose. --** The purpose of this chapter is to:

13 (1) Assure Rhode Islanders retain or expand access to high quality public radio station  
14 programming;

15 (2) To establish a process to evaluate, monitor and review whether changes in control of  
16 public radio stations, or for-profit control of commercial radio licenses historically operated as  
17 public radio stations, is in the public interest and consistent with the intentions of Rhode Island  
18 donors whose contributions had made such stations viable in the past;

19 (3) To establish a review process for determining whether public radio station  
20 conversions provide a community benefit;

21 (4) To clarify the jurisdiction and the authority of the department of attorney general to  
22 preserve and protect public and charitable assets in reviewing public radio station conversions;  
23 and

24 (5) To provide for independent organizations to hold, spend and/or distribute the  
25 conversion fee for public radio station conversions that the attorney general considers not to  
26 provide a community benefit.

27 **18-4.1-4. Definitions. --** As used in this chapter:

28 (1) "Acquiree" means the person or persons that lose(s) any ownership or control,  
29 including programming control, of a public radio station, as the terms "public radio station" and  
30 "person(s)" are defined within this chapter;

31 (2) "Acquirer" means the person or persons which gain(s) an ownership or control,  
32 including programming control, in a public radio station, as the terms "public radio station" and  
33 "person(s)" are defined within this chapter;

34 (3) "Affected community" means any city or town within the state from which an existing

1 public radio station produces, records or otherwise originates programming or broadcasts its  
2 signal, and/or those cities and towns whose inhabitants are regularly served by the existing public  
3 radio station;

4 (4) "Community benefit" means whether the conversion furthers the findings and  
5 purposes of sections 18-4.1-2 and 18-4.1-3 above, and in particular: retains or expands public  
6 radio programming; is consistent with the intent of prior donors to the existing public radio  
7 station; affords substantial opportunity to broadcast programming produced in Rhode Island;  
8 provides programming that is not already prevalent among Rhode Island commercial radio  
9 broadcasters at the time of the conversion; promotes responsible news, information, arts and  
10 cultural programming to help listeners better understand the world around them; and preserves a  
11 substantive governing role for the Rhode Island volunteers, for example, a community board of  
12 directors;

13 (5) "Conversion" means any transfer by a person or persons of an ownership or  
14 membership interest or authority in a public radio station, or the assets of a public radio station,  
15 whether by purchase, merger, consolidation, lease, gift, joint venture, sale, programming  
16 agreement, local management agreement or other disposition which results in a change of  
17 ownership or control, including programming control, or possession of twenty percent (20%) or  
18 greater of the members or voting rights or interests of the public radio station or of the assets of  
19 the public radio station or pursuant to which, by virtue of the transfer, a person, together with all  
20 persons affiliated with the person, holds or owns, in the aggregate, twenty percent (20%) or  
21 greater of the membership or voting rights or interests of the public radio station or of the assets  
22 of the public radio station, or the removal, addition or substitution of a partner which results in a  
23 new partner gaining or acquiring a controlling interest in the public radio station, or any change in  
24 membership which results in a new person gaining or acquiring a controlling vote in the public  
25 radio station;

26 (6) "Conversion Fee" means the amount the department of attorney general orders an  
27 acquirer to pay pursuant to subsection 18-4.1-5(a);

28 (7) "Existing public radio station" means a public radio station as it exists prior to the  
29 conversion;

30 (8) "Public radio station" means a radio station possessing a United States Federal  
31 Communications Commission noncommercial or commercial license to broadcast radio into a  
32 service area primarily located in Rhode Island and which is operated by an entity that may not  
33 lawfully distribute operating surpluses or other retained earnings to individual persons or which  
34 would cease to qualify as an organization described in Section 501(c)(3) of the United States

1 Internal Revenue Code were the organization to do so;

2 (9) "New radio station" means the radio station as it exists after the completion of a  
3 conversion;

4 (10) "Person" means any individual, trust or estate, partnership, corporation (including  
5 associations, joint stock companies and insurance companies,) state or political subdivision or  
6 instrumentality of the state; and

7 (11) "Transacting parties" means any person or persons who seeks either to transfer or  
8 acquire ownership or a controlling interest or controlling authority, including programming  
9 authority, in a public radio station which would result in a change of ownership, control or  
10 authority of twenty percent (20%) or greater.

11 **18-4.1-5. Notice and conversion fee.** -- (a) The transacting parties shall notify the  
12 department of attorney general at least thirty (30) days before the date the acquirer applies to the  
13 United States Federal Communications Commission for any license or approval required to effect  
14 the conversion. In the event the department of attorney general concludes that a conversion has  
15 occurred and did not constitute a community benefit, or a conversion is proposed to occur and  
16 will likely not constitute a community benefit, the department of attorney general shall have the  
17 authority to order the acquirer to pay to an organization pursuant to section 18-4.1-11 below, a  
18 conversion fee upon consummation of the conversion of an amount not to exceed the sum of all  
19 donations made to the acquiree related to its public radio station since its inception, plus two (2)  
20 times the average annual revenue received by the acquiree related to its public radio station  
21 during the preceding three (3) years. The amount of the conversion fee should be sufficient in the  
22 attorney general's opinion, to finance replication of the public radio programming lost in the  
23 conversion. In order to evaluate whether the conversion constitutes a community benefit, the  
24 transacting parties shall be entitled to file such information with the department of attorney  
25 general as they may elect and as the department of attorney general may request.

26 (b) Two (2) copies of the initial application shall be addressed to the attorney general, and  
27 sent to the department of attorney general either by hand (provided the deliverer obtains a receipt  
28 from the department of attorney general for the delivery) or by United States mail, certified,  
29 return receipt requested.

30 (c) Except for information determined by the attorney general in accordance with section  
31 18-4.1-14 to be confidential and/or proprietary, or otherwise required by law to be maintained as  
32 confidential, the initial application and supporting documentation shall be considered public  
33 records and shall be available for inspection upon request.

34 **18-4.1-6. Review process and criteria of the department of attorney general.** -- (a)

1 In considering conversions in accordance with this section, the department of attorney general  
2 shall adhere to the following process:

3 (1) Within sixty (60) days after receipt of an initial filing, the department of attorney  
4 general shall advise the filer, in writing, whether the filing is complete, and, if not, shall specify  
5 all additional information the filer is requested to provide;

6 (2) The filer shall have thirty (30) working days to submit the requested information. If  
7 the additional information is submitted within the thirty (30) day period, the department of  
8 attorney general will have thirty (30) working days within which to determine acceptability of the  
9 additional information. If the additional information is not submitted by the filer within the thirty  
10 (30) day period or if the department of the attorney general determines the additional information  
11 submitted by the filer is insufficient, the conversion will be deemed not to provide a community  
12 benefit and the department of attorney general shall specify a conversion fee to be paid. If the  
13 department of attorney general determines the additional information to be as requested, the filer  
14 will be notified, in writing, of the date of acceptance of the filing;

15 (3) Within sixty (60) working days after acceptance of the initial filing, the department of  
16 attorney general shall render its determination on confidentiality pursuant to section 18-4.1-14  
17 and the department of attorney general shall publish notice of the filing in a newspaper of general  
18 circulation in the state and shall notify by United States mail any person who has requested notice  
19 of the filing. The notice shall:

20 (i) State that an initial filing has been received and accepted for review;  
21 (ii) State the names of the transacting parties;  
22 (iii) State the date by which a person may submit written comments to the department of  
23 attorney general; and

24 (iv) Provide notice of the date, time and place of informational meeting open to the public  
25 which shall be conducted within ninety (90) days of the date of the notice.

26 (4) The department of attorney general shall determine whether the conversion  
27 constitutes a community benefit, and if not, the amount of any applicable payments due, within  
28 one hundred and eighty (180) days of the date of acceptance of the filing.

29 (b) In considering a conversion pursuant to subsection (a) the department of the attorney  
30 general shall consider the following criteria:

31 (1) Whether the proposed conversion will harm the public's interest in property given,  
32 devised, or bequeathed to the existing public radio station for charitable, educational or religious  
33 purposes located or administered in this state;

34 (2) Whether a trustee or trustees of the acquiree will be deemed to have exercised

1 reasonable care, diligence, and prudence in performing as a fiduciary in connection with the  
2 proposed conversion;

3 (3) Whether the board established appropriate criteria in deciding to pursue a conversion  
4 in relation to carrying out its mission and purposes;

5 (4) Whether the board formulated and issued appropriate requests for proposals in  
6 pursuing a conversion;

7 (5) Whether the board considered the proposed conversion as the only alternative or as  
8 the best alternative in carrying out its mission and purposes;

9 (6) Whether any conflict of interest exists concerning the proposed conversion relative to  
10 members of the board, officers, directors, senior management, experts or consultants engaged in  
11 connection with the proposed conversion including, but not limited to, attorneys, accountants,  
12 investment bankers, actuaries, broadcasting experts, or industry analysts;

13 (7) Whether individuals described in subdivision (b)(6) were provided with contracts or  
14 consulting agreements or arrangements which included pecuniary rewards based in whole, or in  
15 part on the contingency of the completion of the conversion;

16 (8) Whether the board exercised due care in engaging consultants with the appropriate  
17 level of independence, education, and experience in similar conversions;

18 (9) Whether the board exercised due care in accepting assumptions and conclusions  
19 provided by consultants engaged to assist in the proposed conversion;

20 (10) Whether the board exercised due care in assigning a value to the existing public  
21 radio station and its charitable assets in proceeding to negotiate the proposed conversion;

22 (11) Whether the board exposed an inappropriate amount of assets by accepting in  
23 exchange for the proposed conversion future or contingent value based upon success of the new  
24 radio station;

25 (12) Whether officers, directors, board members or senior management will receive  
26 future contracts in existing, new, or affiliated public radio stations or organizations;

27 (13) Whether any members of the board will retain any authority in the new radio station;

28 (14) Whether the board accepted fair consideration and value for any management  
29 contracts made part of the proposed conversion;

30 (15) Whether individual officers, directors, board members or senior management  
31 engaged legal counsel to consider their individual rights or duties in acting in their capacity as a  
32 fiduciary in connection with the proposed conversion;

33 (16) Whether the proposed conversion results in an abandonment of the original purposes  
34 of the existing public radio station or whether a resulting entity will depart from the traditional

1 purposes and mission of the existing public radio station such that a cy pres or comparable  
2 proceeding would be necessary in the absence of this statute;

3 (17) Whether the proposed conversion contemplates the appropriate and reasonable fair  
4 market value;

5 (18) Whether the proposed conversion was based upon appropriate valuation methods  
6 including, but not limited to, market approach, third-party report or fairness opinion;

7 (19) Whether the conversion is proper under the Rhode Island nonprofit corporation act  
8 chapter 6 of title 7;

9 (20) Whether the conversion is proper under applicable state tax code provisions;

10 (21) Whether the proposed conversion jeopardizes the tax status of the existing public  
11 radio station;

12 (22) Whether the individuals who represented the existing public radio station in  
13 negotiations avoided conflicts of interest;

14 (23) Whether officers, board members, directors, or senior management deliberately  
15 acted or failed to act in a manner that impacted negatively on the decision to approve the  
16 conversion or its terms and conditions;

17 (24) Whether the formula used in determining the value of the existing public radio  
18 station was appropriate and reasonable which may include, but not be limited to, factors such as:  
19 the multiplier factor applied to the "EBITDA" – earnings before interest, taxes, depreciation, and  
20 amortization; the time period of the evaluation; price/earnings multiplies; the projected efficiency  
21 differences between the existing public radio station and the new radio station; and the historic  
22 value of any tax exemptions granted to the existing public radio station;

23 (25) Whether the proposed conversion appropriately provides for the disposition of  
24 proceeds of the conversion that may include, but not limited to:

25 (i) Whether an existing entity or a new entity will receive the proceeds and whether such  
26 recipient serves the public interest of Rhode Islanders;

27 (ii) Whether appropriate tax status implications of the entity receiving the proceeds have  
28 been considered;

29 (iii) Whether the mission statement and program agenda will be or should be closely  
30 related with the purposes of the mission of the existing public radio station;

31 (iv) Whether any conflicts of interest arise in the proposed handling of the conversion's  
32 proceeds;

33 (v) Whether the bylaws and articles of incorporation have been prepared for the new  
34 entity;

1           (vi) Whether the board of any new or continuing entity will be independent from the new  
2 radio station;

3           (vii) Whether the method for selecting board members, staff, and consultants is  
4 appropriate;

5           (viii) Whether the board will be comprised of an appropriate number of individuals with  
6 experience in pertinent areas such as foundations, public radio, business, labor, community  
7 programs, financial management, legal, accounting, grant making and public members  
8 representing diverse ethnic populations of the affected communities;

9           (ix) Whether the size of the board and proposed length of board terms are sufficient;

10          (26) Whether the transacting parties are in compliance with the Charitable Trust Act,  
11 chapter 9 of title 18;

12          (27) Whether a right of first refusal to repurchase the assets has been retained;

13          (28) Whether the character, commitment, competence and standing in the community, or  
14 any other communities served by the transacting parties are satisfactory;

15          (29) Whether a control premium is an appropriate component of the proposed conversion;

16          (30) Whether the value of assets factored in the conversion is based on past performance  
17 or future potential performance; and

18          (31) Whether based on all the facts and circumstances, the attorney general concludes  
19 that the acquiree's charitable and educational missions are no longer viable absent the conversion.

20          **18-4.1-7. Reports, use of experts, costs. --** (a) The department of attorney general may  
21 in effectuating the purposes of this chapter engage experts or consultants including, but not  
22 limited to, actuaries, investment bankers, accountants, attorneys, or industry analysts. All copies  
23 of reports prepared by experts and consultants, and costs associated with the reports, shall be  
24 made available to the transacting parties and to the public. All costs incurred under this provision,  
25 including internal attorney general costs, shall be the responsibility of one or more transacting  
26 parties in an amount to be determined by the attorney general as he or she deems appropriate. No  
27 filing made pursuant to the requirements of this chapter shall be considered complete unless an  
28 agreement has been executed with the attorney general for the payment of costs in accordance  
29 with this section.

30          **18-4.1-8. Investigations – Notice to attend – Court order to appear – Contempt. –**  
31 (a) The attorney general may conduct investigations in discharging the duties required under this  
32 chapter. For purposes of this investigation the attorney general may require any person, agent,  
33 trustee, fiduciary, consultant, institution, association, or corporation directly related to the  
34 proposed conversion to appear at any time and place that the attorney general may designate, then



1 and there under oath to produce for the use of the attorney general any and all documents and any  
2 other information relating directly to the proposed conversion that the attorney general may  
3 require.

4 (b) Whenever the attorney general may require the attendance of any person as provided  
5 in subsection (a), the attorney general shall issue a notice setting the time and place when the  
6 attendance is required and shall cause the notice to be delivered or sent by registered or certified  
7 mail to the person at least fourteen (14) days before the date fixed in the notice for the attendance.

8 (c) If any person receiving notice pursuant to this provision neglects to attend or remain  
9 in attendance so long as may be necessary for the purposes which the notice was issued, or  
10 refuses to produce information requested, any justice of the superior court for the county within  
11 which the inquiry is carried on or within which the person resides or transacts business, upon  
12 filing by the attorney general, or any transacting party shall have jurisdiction to hear and consider  
13 on an expedited basis the request, and if appropriate and relevant to the consideration of proposed  
14 conversion, may issue to the person an order requiring the person to appear before the attorney  
15 general there to produce for the use of the attorney general evidence in accordance with the terms  
16 of the order of the court, and any failure to obey the order of the superior court may be punished  
17 by the court as contempt of court.

18 **18-4.1-9. Perjury. --** Any person who is found to have testified falsely under oath before  
19 the legislature, or the attorney general pursuant to this chapter shall be subject to prosecution for  
20 perjury and be subject to the penalties set forth in section 18-4.1-18.

21 **18-4.1-10. No derogation of attorney general. --** (a) No provision of this chapter shall  
22 derogate from the common law or statutory authority of the attorney general nor shall any  
23 provision be construed as a limitation on the common law or statutory authority of the attorney  
24 general, including the authority to investigate at any time charitable trusts for the purpose of  
25 determining and ascertaining whether they are being administered in accordance with law and  
26 with the terms and purpose thereof.

27 (b) No provision of this chapter shall be construed as a limitation on the filing of the  
28 doctrine of cy pres or any other legal doctrine applicable to charitable assets and/or charitable  
29 trusts.

30 **18-4.1-11. Distribution of conversion fee – Selection and establishment of a**  
31 **charitable organization. --** (a) Any conversion fee shall be paid to an existing or newly formed  
32 legal entity selected by the attorney general provided such entity is a nonprofit corporation  
33 organized under chapter 6 of title 7, is exempt from taxation under Section 501(a) of the United

States Internal Revenue Code as an organization described in Section 501(c)(3) of such code and has as its primary purpose to promote and/or operate public radio stations in Rhode Island.

**18-4.1-12. Whistleblower protections. --** (a) Prohibition against discrimination. No person subject to the provisions of this chapter, may discharge, demote, threaten or otherwise discriminate against any person or employee with respect to compensation, terms, conditions, or privileges of employment as a reprisal because the person or employee (or any person acting pursuant to the request of the employee) provided or attempted to provide information to the attorney general or his or her designee regarding possible violation or failure to satisfy the approval criteria of this chapter.

(b) Enforcement. Any person or employee or former employee subject to the provisions of this chapter who believes that he or she has been discharged or discriminated against in violation of subsection (a) may file a civil action within three (3) years of the date of discharge or discrimination.

(c) Remedies. If the court determines that a violation has occurred, the court may order the person who committed the violation to:

(1) Reinstatement of the employee to the employee's former position;

(2) Payment of compensatory damages, costs of litigation and attorneys' fees; and/or

(3) Taking other appropriate actions to remedy any past discrimination.

(d) Limitation. The protections of this section shall not apply to any person or employee who:

(1) Deliberately causes or participates in the alleged violation of law or regulation; or

(2) Knowingly or recklessly provides substantially false information to the attorney general or his or her designee.

**18-4.1-13. Failure to comply – Penalties. --** If any person knowingly violates or fails to comply with any provision of this chapter or willingly or knowingly gives false or incorrect information, the superior court may, after notice and opportunity for a prompt and fair hearing, impose a fine of not more than one million dollars (\$1,000,000) or impose a prison term of not more than five (5) years.

**18-4.1-14. Powers of the attorney general. --** (a) The attorney general has the power to decide whether any information required by this chapter of a filer is confidential and/or proprietary. The decisions by the attorney general shall be made prior to any public notice of information filed pursuant to this chapter or any public reviews of any information and shall be binding on the attorney general and all experts or consultants engaged by the attorney general.

1           **(b) The department of attorney general may adopt rules and regulations to accomplish the**  
2 **purpose of this chapter.**

3           **18-4.1-15. Severability. -- If any provision of this chapter or the filing of any provision**  
4 **to any person or circumstances is held invalid, that invalidity shall not affect other provisions or**  
5 **applications of the chapter, which can be given effect without the invalid provision or application,**  
6 **and to this end the provisions of this chapter are declared to be severable.**

7           **18-4.1-16. Judicial review. -- Any transacting party aggrieved by a final order of the**  
8 **attorney general under this chapter may seek judicial review by original action filed in the**  
9 **superior court.**

10           SECTION 2. This act shall take effect upon passage.

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LC03408  
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EXPLANATION  
BY THE LEGISLATIVE COUNCIL  
OF  
A N A C T  
RELATING TO FIDUCIARIES -- PUBLIC RADIO STATIONS

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- 1           This act would establish a statutory regulation system concerning public radio stations  
2   and their conversions.  
3           This act would take effect upon passage.

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