

LC03408/SUB A

# 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:

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

## CHAPTER 4.1

### THE PUBLIC RADIO CONVERSIONS ACT

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

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

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

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

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

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

noncommercial radio license;

(5) Public radio stations that do not operate on frequencies reserved for noncommercial broadcasting may easily be sold to for-profit entities that do maintain public radio programs;

(6) Donations to Rhode Island charities are given with the intent that each charity will use the donations to support the charity's mission as long as the charity and mission are viable; and

(7) In order to protect public welfare and public and charitable assets, and ensure that Rhode Islanders' gifts to Rhode Island public radio stations are used for their intended purposes, it is necessary to establish standards and procedures that result in recoupment of public investment through the assessment of a conversion fee to create the financial infrastructure to replicate public radio programming that may be lost in the sale of a public station to a commercial operator.

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

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

(2) Establish a process to evaluate, monitor and review whether the conversion of a public radio station to a commercial station is consistent with the intentions of Rhode Island donors whose contributions had made the noncommercial station viable;

(3) Establish a review process for determining whether assessment of a conversion fee is appropriate in a public radio station conversion;

(4) Clarify the jurisdiction and the authority of the department of attorney general to preserve and protect public and charitable assets in reviewing public radio station conversions; and

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

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

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

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

(3) "Affected community" means any city or town within the state from which an existing public radio station produces, records or otherwise originates programming or broadcasts its signal, and/or those cities and towns whose inhabitants are regularly served by the existing public

1 radio station;

2 (4) "Community benefit" means:

3 (i) whether the conversion furthers the findings and purposes of sections 18-4.1-2 and 18-

4 4.1-3 above, and in particular: retains or expands public radio programming;

5 (ii) is consistent with the intent of prior donors to the existing public radio station;

6 (iii) affords substantial opportunity to provided noncommercial radio programming

7 produced in Rhode Island;

8 (iv) provides programming that is not already prevalent among Rhode Island commercial

9 radio broadcasters at the time of the conversion;

10 (v) promotes responsible news, information, arts and cultural programming to help

11 listeners better understand the world around them; and

12 (vi) preserves a substantive governing role for the Rhode Island volunteers, for example,

13 a community board of directors.

14 (5) "Conversion" means any:

15 (i) transfer or assignment by a person or persons of an ownership or membership interest

16 or authority in a public radio station, or the assets of a public radio station, whether by purchase,

17 merger, consolidation, lease, gift, joint venture, sale, or otherwise;

18 (ii) agreement, such as a local management agreement or programming agreement, the

19 implementation of which would require a change in the public radio station's broadcast license to

20 permit commercial operations;

21 (iii) transfer, assignment or issuance of twenty percent (20%) or greater of the

22 membership or voting rights or interests of the public radio station or of the assets of the public

23 radio station or pursuant to which, by virtue of the transfer, a person, together with all persons

24 affiliated with the person, holds or owns, in the aggregate, twenty percent (20%) or greater of the

25 membership or voting rights or interests of the public radio station or of the assets of the public

26 radio station;

27 (iv) the removal, addition or substitution of a partner that results in a new partner gaining

28 or acquiring a controlling interest in the public radio station; or

29 (v) any change in membership that results in a new person gaining or acquiring a

30 controlling vote in the public radio station.

31 (6) "Conversion Fee" means the amount the department of attorney general orders an

32 acquirer to pay pursuant to subsection 18-4.1-5(a);

33 (7) "Existing public radio station" means a public radio station as it exists prior to the

34 conversion;

1       (8) "Public radio station" means a radio station possessing a United States Federal  
2 Communications Commission noncommercial license, to broadcast on a frequency that is not  
3 reserved by the FCC for noncommercial use, assigned to a community of license located in  
4 Rhode Island and which is operated by an entity that may not lawfully distribute operating  
5 surpluses or other retained earnings to individual persons or which would cease to qualify as an  
6 organization described in Section 501(c)(3) of the United States Internal Revenue Code were the  
7 organization to do so;

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

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

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

17       **18-4.1-5. Notice and Conversion Fee. --** (a) The transacting parties shall notify the  
18 department of attorney general within five (5) business days after entering into an agreement for  
19 conversion of public radio station, and in no event later than the date on which an application to  
20 transfer, assign or amend the license of a public radio station to permit commercial operations is  
21 filed with the FCC. In the event the department of attorney general concludes that a conversion  
22 has occurred and did not constitute a community benefit, or a conversion is proposed to occur and  
23 will likely not constitute a community benefit, the department of attorney general shall have the  
24 authority to order the acquirer to pay to an organization pursuant to section 18-4.1-11 below, a  
25 conversion fee upon consummation of the conversion of an amount not to exceed the sum of all  
26 donations made to the acquiree related to its public radio station since its inception, plus two (2)  
27 times the average annual revenue received by the acquiree related to its public radio station  
28 during the preceding three (3) years. The amount of the conversion fee should be sufficient in the  
29 attorney general's opinion, to finance production of the public radio programming lost in the  
30 conversion. In order to evaluate whether the conversion constitutes a community benefit, the  
31 transacting parties shall be entitled to file such information with the department of attorney  
32 general as they may elect and as the department of attorney general may request.

33       (b) Two (2) copies of the initial application shall be addressed to the attorney general, and  
34 sent to the department of attorney general either by hand (provided the deliverer obtains a receipt

1 from the department of attorney general for the delivery) or by United States mail, certified,  
2 return receipt requested.

3 (c) Except for information determined by the attorney general in accordance with section  
4 18-4.1-14 to be confidential and/or proprietary, or otherwise required by law to be maintained as  
5 confidential, the initial application and supporting documentation shall be considered public  
6 records and shall be available for inspection upon request.

7 **18-4.1-6. Review process and criteria of the department of attorney general. -- (a)**

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

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

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

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

27 (i) State that an initial filing has been received and accepted for review;

28 (ii) State the names of the transacting parties;

29 (iii) State the date by which a person may submit written comments to the department of  
30 attorney general; and

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

33 (4) The department of attorney general shall determine whether the conversion  
34 constitutes a community benefit, and if not, the amount of any applicable payments due, within

1 one hundred and eighty (180) days of the date of acceptance of the filing.

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

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

7 (2) Whether a trustee or trustees of the acquiree will be deemed to have exercised  
8 reasonable care, diligence, and prudence in performing as a fiduciary in connection with the  
9 proposed conversion;

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

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

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

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

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

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

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

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

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

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

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

- 1           (14) Whether the board accepted fair consideration and value for any management  
2 contracts made part of the proposed conversion;
- 3           (15) Whether individual officers, directors, board members or senior management  
4 engaged legal counsel to consider their individual rights or duties in acting in their capacity as a  
5 fiduciary in connection with the proposed conversion;
- 6           (16) Whether the proposed conversion results in an abandonment of the original purposes  
7 of the existing public radio station or whether a resulting entity will depart from the traditional  
8 purposes and mission of the existing public radio station such that a cy pres or comparable  
9 proceeding would be necessary in the absence of this statute;
- 10           (17) Whether the proposed conversion contemplates the appropriate and reasonable fair  
11 market value;
- 12           (18) Whether the proposed conversion was based upon appropriate valuation methods  
13 including, but not limited to, market approach, third-party report or fairness opinion;
- 14           (19) Whether the conversion is proper under the Rhode Island nonprofit corporation act  
15 chapter 6 of title 7;
- 16           (20) Whether the conversion is proper under applicable state tax code provisions;
- 17           (21) Whether the proposed conversion jeopardizes the tax status of the existing public  
18 radio station;
- 19           (22) Whether the individuals who represented the existing public radio station in  
20 negotiations avoided conflicts of interest;
- 21           (23) Whether officers, board members, directors, or senior management deliberately  
22 acted or failed to act in a manner that impacted negatively on the decision to approve the  
23 conversion or its terms and conditions;
- 24           (24) Whether the formula used in determining the value of the existing public radio  
25 station was appropriate and reasonable which may include, but not be limited to, factors such as:  
26 the multiplier factor applied to the "EBITDA" – earnings before interest, taxes, depreciation, and  
27 amortization; the time period of the evaluation; price/earnings multiplies; the projected efficiency  
28 differences between the existing public radio station and the new radio station; and the historic  
29 value of any tax exemptions granted to the existing public radio station;
- 30           (25) Whether the proposed conversion appropriately provides for the disposition of  
31 proceeds of the conversion that may include, but not limited to:
- 32           (i) Whether an existing entity or a new entity will receive the proceeds and whether such  
33 recipient serves the public interest of Rhode Islanders;
- 34           (ii) Whether appropriate tax status implications of the entity receiving the proceeds have

1 been considered;

2 (iii) Whether the mission statement and program agenda will be or should be closely

3 related with the purposes of the mission of the existing public radio station;

4 (iv) Whether any conflicts of interest arise in the proposed handling of the conversion's

5 proceeds;

6 (v) Whether the bylaws and articles of incorporation have been prepared for the new

7 entity;

8 (vi) Whether the board of any new or continuing entity will be independent from the new

9 radio station;

10 (vii) Whether the method for selecting board members, staff, and consultants is

11 appropriate;

12 (viii) Whether the board will be comprised of an appropriate number of individuals with

13 experience in pertinent areas such as foundations, public radio, business, labor, community

14 programs, financial management, legal, accounting, grant making and public members

15 representing diverse ethnic populations of the affected communities;

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

17 (26) Whether the transacting parties are in compliance with the Charitable Trust Act,

18 chapter 9 of title 18;

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

20 (28) Whether the character, commitment, competence and standing in the community, or

21 any other communities served by the transacting parties are satisfactory;

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

23 (30) Whether the value of assets factored in the conversion is based on past performance

24 or future potential performance; and

25 (31) Whether based on all the facts and circumstances, the attorney general concludes

26 that the acquiror's charitable and educational missions are no longer viable absent the conversion.

27 **18-4.1-7. Reports, use of experts, costs. --** (a) The department of attorney general may

28 in effectuating the purposes of this chapter engage experts or consultants including, but not

29 limited to, actuaries, investment bankers, accountants, attorneys, or industry analysts. All copies

30 of reports prepared by experts and consultants, and costs associated with the reports, shall be

31 made available to the transacting parties and to the public. All costs incurred under this provision,

32 including internal attorney general costs, shall be the responsibility of one or more transacting

33 parties in an amount to be determined by the attorney general as he or she deems appropriate. No

34 filing made pursuant to the requirements of this chapter shall be considered complete unless an



1 agreement has been executed with the attorney general for the payment of costs in accordance  
2 with this section.

3 **18-4.1-8. Investigations – Notice to attend – Court order to appear – Contempt. –**

4 (a) The attorney general may conduct investigations in discharging the duties required under this  
5 chapter. For purposes of this investigation the attorney general may require any person, agent,  
6 trustee, fiduciary, consultant, institution, association, or corporation directly related to the  
7 proposed conversion to appear at any time and place that the attorney general may designate, then  
8 and there under oath to produce for the use of the attorney general any and all documents and any  
9 other information relating directly to the proposed conversion that the attorney general may  
10 require.

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

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

25 **18-4.1-9. Perjury. --** Any person who is found to have testified falsely under oath before  
26 the legislature, or the attorney general pursuant to this chapter shall be subject to prosecution for  
27 perjury and be subject to the penalties set forth in section 18-4.1-13.

28 **18-4.1-10. No derogation of attorney general. --** (a) No provision of this chapter shall  
29 derogate from the common law or statutory authority of the attorney general nor shall any  
30 provision be construed as a limitation on the common law or statutory authority of the attorney  
31 general, including the authority to investigate at any time charitable trusts for the purpose of  
32 determining and ascertaining whether they are being administered in accordance with law and  
33 with the terms and purpose thereof.

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

4 **18-4.1-11. Distribution of conversion fee – Selection of a charitable organization by**  
5 **superior court. --** (a) Any conversion fee shall be awarded by the superior court to an existing or  
6 newly formed legal entity that is a nonprofit corporation organized under chapter 6 of title 7, is  
7 exempt from taxation under Section 501(a) of the United States Internal Revenue Code as an  
8 organization described in Section 501(c)(3) of such code and has as its primary purpose to  
9 promote and/or operate public radio stations in Rhode Island.

10 **18-4.1-12. Whistleblower protections. --** (a) Prohibition against discrimination. No  
11 person subject to the provisions of this chapter, may discharge, demote, threaten or otherwise  
12 discriminate against any person or employee with respect to compensation, terms, conditions, or  
13 privileges of employment as a reprisal because the person or employee (or any person acting  
14 pursuant to the request of the employee) provided or attempted to provide information to the  
15 attorney general or his or her designee regarding possible violation or failure to satisfy the  
16 approval criteria of this chapter.

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

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

23 (1) Reinstate the employee to the employee's former position;

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

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

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

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

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

31 **18-4.1-13. Failure to comply – Penalties. --** If any person knowingly violates or fails to  
32 comply with any provision of this chapter or willingly or knowingly gives false or incorrect  
33 information, the superior court may, after notice and opportunity for a prompt and fair hearing,  
34 impose a fine of not more than one million dollars (\$1,000,000).

1           **18-4.1-14. Disclosure of documents. --** The attorney general has the power to decide  
2 whether any information required by this chapter of a filer is confidential and/or proprietary. The  
3 decisions by the attorney general shall be made prior to any public notice of information filed  
4 pursuant to this chapter or any public reviews of any information and shall be binding on the  
5 attorney general and all experts or consultants engaged by the attorney general.

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

10           **18-4.1-16. Judicial review. --** Any transacting party aggrieved by a final order of the  
11 attorney general under this chapter may seek judicial review by original action filed in the  
12 superior court.

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

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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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Presented by