



**Federal Communications Commission
Washington, D.C. 20554**

July 31, 2012

In Reply Refer to:
1800B3-SS

Western North Carolina Public Radio, Inc.
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The Ad-Hoc Committee for Responsive
Public Radio
c/o Mr. Fred Flaxman
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Mr. J. Russell Lindstrom
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Mr. Martin A. Dyckman
355 Fox Run Road
Waynesville, NC 28785

In re: Western North Carolina Public Radio, Inc.
WCQS(FM), Asheville, North Carolina
Facility ID No. 71923
File No. BRED-20110801AIZ

Application for Renewal of License

Petition to Deny

Informal Objections

Dear Counsel and Messrs. Flaxman, Lindstrom & Dyckman:

We have before us the referenced application of Western North Carolina Public Radio, Inc. ("WNCPR") for renewal of license of non-commercial educational ("NCE") Station WCQS(FM), Asheville, North Carolina (the "Station"), filed on August 1, 2011 (the "Application"). We also have before us a Petition to Deny (the "Petition") the grant of the Application, filed by The Ad-Hoc Committee for Responsive Public Radio (the "Committee") on October 28, 2011,¹ and Informal Objections to the Application, filed on April 9 and 10, 2012, respectively, by Martin A. Dyckman and J. Russell Lindstrom

¹ On November 28, 2011, WNCPR filed an Opposition to Petition to Deny (the "Opposition"), to which the Committee replied (the "Reply") on December 27, 2011. On April 17, 2012, the Committee submitted a copy of a January 13, 2012, letter sent to the WNCPR Chairman of the Board of Directors Bryan Smith regarding the Committee's concerns with the Station.

(the “Dyckman Objection” and “Lindstrom Objection”). For the reasons set forth below, we dismiss the Petition and, when treated as an Informal Objection, we deny it; we also deny the Dyckman and Lindstrom Objections and grant the Application.

Background. WNCPR timely filed the Application on August 1, 2011. In its Petition, the Committee argues that the Station’s license should not be renewed because it has “violated federal law for 13 years by not having an active Community Advisory Board” (“CAB”) and for not complying with other requirements imposed on recipients of grants from the Corporation for Public Broadcasting (“CPB”).² In addition, the Committee claims that the Station “does not broadcast any programs created by local, independent producers”;³ has “never surveyed its listeners to find out their opinions on the programs being broadcast or new programming they planned to introduce”; and “[the Station] does not conduct any formal ascertainment of the needs of the communities it serves.”⁴

In its Opposition, WNCPR argues that the Petition is procedurally defective and should be treated as an informal objection because Committee’s allegations are not supported by an affidavit of a person with personal knowledge of the allegations of fact as required by Section 309(d) of the Communications Act of 1934, as amended (the “Act”).⁵ In addition, WNCPR claims that it has taken “corrective actions” so that a “CAB that meets the [Public Broadcasting] Act and CPB requirements” is now in place.⁶ WNCPR further argues that the Committee cites no authority for the proposition that “broadcast stations are required to broadcast some ‘specified quantity of programs created by local, independent producers.’”⁷ It also argues that “formal ascertainment” requirements were eliminated for NCE stations in 1984.⁸ Finally, WNCPR contends that the Petition fails to present any facts showing a violation of the Commission’s rules or the Act which would warrant denying the license renewal application.

In its Reply,⁹ the Committee reiterates the allegations made in its Petition, emphasizing that the acknowledged violation of the federal law, *i.e.*, the Public Broadcasting Act, for more than a decade should by itself be sufficient to warrant denial of the Application.¹⁰

In their Objections, Dyckman and Lindstrom complain that the station has refused to air Saturday afternoon broadcasts of the Metropolitan Opera, which are carried by station affiliated with National

² Petition at 1.

³ The Committee later notes that Fred Flaxman (“Flaxman”), an independent local producer and the Committee’s organizer, has offered his award-winning programs free of charge for broadcast on the Station only to be “consistently turned down.” Reply at 3.

⁴ Petition at 1.

⁵ 47 U.S.C. § 309(d); *see also* Opposition at 2. It argues that Flaxman’s “affidavit” is merely a “Statement” because it is neither notarized nor made under penalty of perjury. *Id.* at n.1.

⁶ *Id.* at 3.

⁷ *Id.* at 4.

⁸ *Id.* at 6, citing *Revision of Program Policies and Reporting Obligations Related to Public Broadcasting Licensees*, Report and Order, FCC 84-294, 56 FCC Rcd 1157 (1984).

⁹ *See* 47 C.F.R. § 73.3584(b) (reply is due “within 20 days after the opposition is filed . . .”). The Committee filed its Reply 30 days after the Opposition was filed.

¹⁰ Reply at 1.

Public Radio in many other listening areas. Dyckman states that, despite repeated entreaties, “all I have been able to obtain in a year and a half of trying is an assertion by the station’s Executive Director that it would cost WCQS more support than it would gain” to air the opera broadcasts. He accuses the Station “of insensitivity to the opinions of the public which it is supposed to serve,”¹¹ and Lindstrom similarly argues that the Station has shown “an apparent lack of concern for the listening public.”¹²

Discussion. Procedural Issue. Initially, we agree with WNCPR that the Committee’s pleading is procedurally defective as a petition to deny. Section 309(d)(1) of the Act and Section 73.3584 of the Commission’s Rules (the “Rules”) require that petitions to deny be supported by affidavits or declarations under penalty of perjury from persons with personal knowledge of the facts set forth in the petition.¹³ Flaxman’s “Affidavit of Facts Contained in This Petition” was not notarized and was not made under penalty of perjury.¹⁴ Accordingly, the Committee’s Petition is procedurally defective and must be dismissed. We will, however, treat the Petition as an Informal Objection pursuant to Section 73.3587 of the Rules.¹⁵

Substantive Issues. In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act.¹⁶ That Section provides that if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.¹⁷ If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”¹⁸ Further, pursuant to Sections 309(d) and (e) of the Act,¹⁹ informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact calling for further inquiry regarding whether grant of the Application would be *prima facie* inconsistent with Section 309(a) of the Act.²⁰ If no such question is raised, and the

¹¹ Dyckman Objection at 1.

¹² Lindstrom Objection at 2.

¹³ See *Columbia Broadcasting System, Inc.*, Memorandum Opinion and Order, 46 FCC 2d 903 (1974).

¹⁴ See Petition at Attachment 1.

¹⁵ 47 C.F.R. § 73.3587; see also, e.g., *WHOA-TV, Inc. (Assignor) and Park of Montgomery II, Inc. (Assignee) and Park Acquisitions, Inc. (Transferor) and Media General, Inc. (Transferee)*, Memorandum Opinion and Order, 11 FCC Rcd 20041, 20042 n.3 (1996) (Commission treats petition to deny as an informal objection where petitioner has not demonstrated status as a party in interest).

¹⁶ 47 U.S.C. § 309(k).

¹⁷ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

¹⁸ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

¹⁹ 47 U.S.C. § 309(e).

²⁰ *Id.* § 309(a). See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, (continued . . .))

Commission can make the required public interest determination, it will deny the informal objection and grant the license renewal application.

Notably, the Committee does not claim that WNCPR has violated the Act or any of the Rules. Rather, its core complaint is the alleged violation of CPB requirements. However, the Court of Appeals for the District of Columbia Circuit held in 1985 that the Public Broadcasting Act does not require incorporation of CPB requirements into the Commission's licensing proceedings.²¹ Additionally, WNCPR submits into the record a ruling by CPB's Inspector General finding that "although WNCPR had not fully complied with all CPB requirements in the past, WNCPR had taken corrective actions and 'had established a functioning CAB that meets the [Public Broadcasting] Act and CPB requirements.'"²² Despite the Committee's claim that its CAB "is that in name only," CPB's determination on this issue is dispositive, and no further discussion of this matter is required.

Regarding the Dyckman and Lindstrom allegations about the Station's programming, the Commission's role in overseeing program content is limited. The First Amendment to the United States Constitution²³ and Section 326 of the Act²⁴ prohibit the Commission from censoring program material or interfering with broadcasters' free speech rights. Generally, the Commission will not take adverse action on a license renewal application based upon the subjective determination of a listener or group of listeners as to what constitutes appropriate programming.²⁵ Rather, a licensee has broad discretion -- based on its right of free speech -- to choose, in good faith, the programming that it believes serves the needs and interests of the members of its audience.²⁶ The Commission will not substitute its judgment for that of the station regarding programming matters and will intervene in programming matters only if a licensee abuses that discretion.²⁷ This is particularly true with regard to the programming decisions of NCE stations, based on the Commission's historically "limited role of facilitating the development of the public

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1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

²¹ See *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 681-82 (D.C. Cir. 1985) (the Commission is not required to consider allegations of violations of The Public Broadcasting Act's provisions in its public interest determinations).

²² Opposition at 3, citing *Corporation for Public Broadcasting, Office of Inspector General, Special Review of Western North Carolina Public Radio, Inc.*, Report No. ECR906-906 p.2 (rel. Aug. 14, 2009).

²³ U.S. Const. amend. I.

²⁴ 47 U.S.C. § 326.

²⁵ See *WGBH Educational Foundation*, Memorandum Opinion and Order, 69 FCC 2d 1250, 1251 (1978).

²⁶ See, e.g., *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993), citing *Time-Life Broadcast, Inc.*, Memorandum Opinion and Order, 33 FCC 2d 1081, 1082 (1972), and *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) ("*United Church of Christ*") (subsequent history omitted).

²⁷ See *Entertainment Formats*, Memorandum Opinion and Order, 60 FCC 2d 858 (1976), *recon. denied*, Memorandum Opinion and Order, 66 FCC 2d 78 (1977) and *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 595-98 (1981) ("Commission has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats.").

broadcasting system rather than determining the content of its programming.”²⁸ That the Station chooses not to air programming that Dyckman and Lindstrom wish to hear is not a basis for denial or designation of the Application.

Similarly, with respect to the Committee’s allegations regarding the Station’s failure to air programming offered by local program producers, licensees have a duty to respond to local needs and issues and the Commission remains concerned about “localism” in broadcasting.²⁹ However, there is no Commission rule requiring a station to air programming offered by local producers, and the Station’s alleged failure to do so here, even if true, does not constitute grounds for denial or designation of the Application.

Finally, with respect to the Committee’s claim that WNCPR does not conduct ascertainment of the needs and interests of its listeners, in the 1980’s, the Commission adopted rules substantially deregulating such requirements for commercial and non-commercial radio stations.³⁰ These rule changes were intended to increase a licensee’s flexibility in meeting the changing needs of its community. Thus, the Commission no longer dictates specifically how a licensee must determine the needs and interests of its community of license, only that it do so and that, for example, it reflect the results of its efforts in quarterly issues/programs lists.³¹ The lists are retained in the public inspection file until final action on the station’s renewal application.

Here, WNCPR states that it determines issues of importance to its community by a variety of methods including: (1) conducting surveys; (2) obtaining input from the Station’s Board of Directors and its CAB; (3) collaborating with a variety of local and regional newspapers, bloggers, and online newsletters; (4) staff appearances at local public events; (5) Station membership in the Asheville and Henderson County Chambers of Commerce; (6) meetings between the WNCPR news department and community members; and (7) ongoing interaction with listeners, supports, and critics “such as the Committee and Mr. Flaxman.”³² Moreover, WNCPR certifies in the Application that the appropriate

²⁸ *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licenses*, Notice of Proposed Rule Making, 87 FCC 2d 716, 732 (1981). See also *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993) (licensees have broad discretion over programming decisions).

²⁹ See *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 (2004).

³⁰ *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, *recon. granted in part*, Memorandum Opinion and Order, 87 FCC 2d 797 (1981) (“*Deregulation Order*”), *aff’d in part and remanded in part sub nom, United Church of Christ*, 707 F.2d 1413 (D.C. Cir. 1983). Accord, *Programming Information in Broadcast Applications*, Memorandum Opinion and Order, 3 FCC Rcd 5467, 5468 (1988) (Commission deleted the requirement for applicants to submit detailed programming proposals that established “promises” from which to later evaluate a licensee’s performance, replacing it with a requirement to provide a brief narrative description of proposed community programming. “To mandate a specific, detailed proposal from applicants would be inconsistent with the flexibility accorded licensees to adapt programming to changing marketplace incentives without regulatory intrusion.”); *Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licenses*, Report and Order, 98 FCC 2d 746, 754 (1984) (“*NCE Deregulation Order*”) (“... ascertainment obligations will no longer be applied to public stations.”).

³¹ See, e.g., *Formulation of Policies and Rules to Broadcast Renewal Applicants*, Third Further Notice of Inquiry and Notice of Proposed Rule Making, 4 FCC Rcd 6363, 6365 (1989); see also 47 C.F.R. § 73.3527(e)(8)(i).

³² Opposition at 7.

documentation has been timely placed in the Station's public inspection file.³³ No further discussion is required regarding this allegation.

In light of the discussion above, we find that neither the Petition nor the Objections establish a substantial and material question of fact calling for further inquiry regarding grant of the Application. Additionally, we have evaluated the Application and, pursuant to Section 309(k) of the Act,³⁴ we find that the Station has served the public interest, convenience, and necessity during the subject license term, there have been no serious violations of the Act or the Rules, and there have been no other violations, which taken together, constitute a pattern of abuse.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED, that the Petition to Deny filed by The Ad-Hoc Committee for Responsive Public Radio IS DISMISSED, and when treated as an Informal Objection, it IS DENIED.

IT IS FURTHER ORDERED, that the Informal Objections filed by Martin A. Dyckman and J. Russell Lindstrom, respectively, ARE DENIED.

IT IS FURTHER ORDERED, that the application (File No. BRED-20110801AIZ) of Western North Carolina Public Radio, Inc., for renewal of license for station WCQS(FM), Asheville, North Carolina, IS GRANTED.

Sincerely,


Peter H. Doyle
Chief, Audio Division
Media Bureau

³³ Application, Section III, Item 3.

³⁴ 47 U.S.C. § 309(k)(1).