



Federal Communications Commission
Washington, D.C. 20554

April 30, 2007

DA 07-1949

In Reply Refer to:

1800B3-KD

Released: April 30, 2007

John Neely, Esq.
Suite 704
6900 Wisconsin Ave.
Bethesda, MD 20815

In re: KGEZ(AM), Kalispell, MT
Facility ID No. 60575
Skyline Broadcasters, Inc.
File No. BR-20041130AMS

Application for Renewal of License

Petitions to Deny and Informal Objections

Dear Mr. Neely:

We have before us: (1) the above-noted application (the "Application") of Skyline Broadcasters, Inc. (the "Licensee") for renewal of its license for Station KGEZ(AM), Kalispell, Montana (the "Station"); (2) various Petitions to Deny the Application, filed by Scott Nicolson on November 11, 2005, Oliver G. Coburn on February 14, 2005, Kate Hunt on February 15, 2005, Montana Human Rights Network ("MHRN") on March 25, 2005, and Keith Hammer, Christine Kaufman and Ken Toole on March 28, 2005;¹ (3) Informal Objections to the Application filed by various Station listeners (all of the filers of the Petitions to Deny and the Informal Objections are referred to herein collectively as "Objectors");² and (4) an Opposition to these submissions filed by the Licensee on March 7, 2005 (the "Opposition"). For the reasons set forth below, we deny the Petitions to Deny filed by Kate Hunt and Oliver G. Coburn, consider the remaining Petitions to Deny as informal objections because they were untimely filed, deny them and the other Informal Objections, and grant the Application.

Background. Objectors allege that that the license for the Station should not be renewed because John Stokes ("Stokes"), President of the Licensee and a radio personality on the Station, allegedly

¹ Petitions to deny an application for renewal of the license of an existing broadcast station must be filed no later than the first day of the last full calendar month of the expiring license term. 47 C.F.R. § 73.3516(e). For radio stations licensed in communities in Montana, because their licenses expired on April 1, 2005, the applicable petition filing deadline was March 1, 2005. 47 C.F.R. § 73.1020(a)(10). The pleadings filed by Scott Nicolson, MHRN, Keith Hammer, Christine Kaufman and Ken Toole thus fail to meet the requirements of a petition to deny. We will, however, treat them as informal objections, pursuant to Section 73.3587 of the Commission's Rules (the "Rules"). See 47 C.F.R. § 73.3587.

² Informal Objections were filed by Neal Brown on May 18, 2005, Roger and Susan Sherman, Susan Waldron and Clark Reynolds on February 22, 2005, Celeste and George McLean on February 17, 2005, Sheila Conners on February 25, 2005, and Lorney Jay Deist on April 5, 2005.

broadcast the following material on his daily talk show program: (1) hate speech and speech that incites violence; (2) false and defamatory statements about several Objectors; (3) indecent speech; and (4) personal information about several Objectors. Several Objectors further allege that the corporation listed as the Licensee in its Application dissolved in 2001. Finally, several Objectors assert that the Licensee has filed frivolous lawsuits against them and has made misrepresentations about them in its Opposition.³

Discussion. Both petitions to deny and informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (the “Act”), provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(k) of the Act,⁴ which governs our evaluation of an application for license renewal. Specifically, Section 309(k)(1) provides that we are to grant the renewal application 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 Commission’s Rules (the “Rules”); and (3) there have been no other violations which, taken together, constitute a pattern of abuse.⁵ 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.”⁶

Programming Objections. Several Objectors have argued that the Station’s license should not be renewed because the Licensee broadcasts over the Station hate speech and speech that allegedly incites violence. For example, Objectors claim that, on his program, Stokes has used the term “Nazis” to describe environmentalists,⁷ has advocated the sale of white sheets during the Martin Luther King, Jr. celebration,⁸ and has referred to a gay woman as a “stupid gumba.”⁹ Objectors further allege that Stokes has promoted and encouraged violent behavior on his program, such as encouraging listeners to run

³ In its Opposition, the Licensee states that the complained-of broadcasts are not subject to regulation by the Commission and therefore should not preclude the Station’s license renewal. Opposition at 1-2. The Licensee further asserts that several Objectors have been actively trying for several years to put the Station out of business. Opposition at 2. The Licensee also provides additional background information about several Objectors, and their alleged affiliated organizations and their activities. *Id.*

⁴ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 note 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

⁵ 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).

⁶ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

⁷ Scott Nicolson informal objection at 1; Kate Hunt Petition to Deny at 2; MHRN informal objection at 2.

⁸ Roger and Susan Sherman informal objection at 1.

⁹ Clark Reynolds informal objection at 1.

bicyclists off the road¹⁰ or to tear down entrance gates at state parks.¹¹ Several Objectors have also asserted that Stokes has broadcast false statements about them and has launched personal attacks against them without providing them with notice and an opportunity to respond.¹² Finally, two Objectors allege that Stokes has broadcast their home addresses without first obtaining their permission to do so.¹³

The role of the Commission in overseeing program content is limited. The First Amendment to the United States Constitution and Section 326 of the Act prohibit the Commission from censoring program material or interfering with broadcasters' free speech rights. The Commission does regulate broadcast content where federal statutes direct it to do so. For example, the Commission enforces the statutory prohibition on the broadcast of obscene, indecent and profane material contained in 18 U.S.C. § 1464. However, 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.¹⁴ Licensees have broad discretion – based on their right to free speech -- to choose, in good faith, the programming that they believe serves the needs and interests of their communities.¹⁵ This holds true even if the material broadcast is insulting to a particular minority or ethnic group in the station's community.¹⁶ Indeed, as we have held in earlier decisions, "if there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable and congenial."¹⁷ We will intervene in programming matters only if a licensee abuses that discretion.¹⁸ Objectors have not demonstrated that the Station has done so here.

¹⁰ Roger and Susan Sherman informal objection at 1; Celeste and George McLean informal objection at 1.

¹¹ Roger and Susan Sherman informal objection at 1; Susan Waldon informal objection at 1; MHRN informal objection at 5.

¹² For example, MHRN alleges that Stokes has falsely accused it of engaging in criminal behavior, such as tax fraud and charity fraud, and being affiliated with the Ku Klux Klan. MHRN Petition at 2, 5. Another Objector claims that Stokes has broadcast false claims that she was indicted on criminal charges and was forced to resign from her job as a result. Lorney Jay Deist Objection at 1. *See also* Christine Kaufman informal objection at 1-3; Ken Toole informal objection at 2-3 (each asserting that Stokes has broadcast false claims about them).

¹³ Keith Hammer informal objection at 1; Neal Brown informal objection at 1.

¹⁴ *See WGBH Educational Foundation*, Memorandum Opinion and Order, 69 FCC 2d 1250, 1251 (1978).

¹⁵ *See, e.g., License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993) ("*Philadelphia Station License Renewals*"), 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) (subsequent history omitted).

¹⁶ *Zapis Communications Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 3888 (MB 1992).

¹⁷ *Id.* (citing *Anti-Defamation League of B'nai B'rith*, Memorandum Opinion, 4 FCC 2d 190, 192 (1966), *aff'd*, Memorandum Opinion and Order, 6 FCC 2d 385 (1967), *aff'd sub nom. Anti-Defamation League of B'nai B'rith v. FCC*, 403 F. 2d 169 (1968), *cert. denied*, 394 U.S. 930 (1969)).

¹⁸ *Philadelphia Station License Renewals*, 8 FCC Rcd at 6401 (abuse of discretion occurs if a licensee is unreasonable or discriminatory in its selection of issues that it believes are of concern to the local community or if it offers such nominal levels of issue-responsive programming as to have effectively defaulted on its obligation).

As to claims by Objectors that Licensee has broadcast false statements or personal information about them, such as their home addresses, such allegations are outside of the Commission's jurisdiction. Such allegations are properly the subject of private defamation or invasion of privacy actions under state law, not of Commission licensing proceedings.¹⁹ Moreover, the Commission repealed its rule regarding personal attacks seven years ago.²⁰ Accordingly, the Commission does not regulate the conduct that is the subject of these objections.

Finally, there is no statute or Rule that directly prohibits the viewpoints expressed in Stokes' programs, discussed above, that allegedly incited violence. Consequently, the only question before us is whether the broadcasts raise a substantial question about the Licensee's basic qualifications. In light of Commission precedent on point, we find that no question regarding the licensee's basic qualifications is raised. Indeed, in a recent enforcement action, the Commission analyzed broadcasts which, according to the objectors in that case, advocated violence against bicyclists. Therein, it stated:

Commission action in response to an allegation that a broadcast should be characterized as an 'incitement' to violence or illegal action meeting the "clear and present danger" test is limited to situations where a local court of competent jurisdiction has made such a determination. *See Cattle Country Broadcasting*, 58 R.R.2d 1109, 1113 (1985); *see also Brandenburg v. Ohio*, ("Brandenburg"), 395 U.S. 444, 447 (1969) (speech becomes illegal advocacy when "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). This aspect of the test requires a court to "make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1975).

... Under *Brandenburg*, any determination that particular speech poses a "clear and present danger of serious substantive evil" presupposes a familiarity with the circumstances, issues, and concerns of the community where such speech was heard, a familiarity which the Commission, in most cases, does not have and cannot practically obtain. Local authorities responsible for keeping the peace and enforcing the law are better positioned to know and assess the specific and unique circumstances in the ... community and, thus, to determine whether the *Brandenburg* test has been met."²¹

¹⁹ *Jacor Broadcasting of Tampa Bay, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 1826 (MB 1992) (citing *Anti-Defamation League of B'nai B'rith*, Memorandum Opinion, 4 FCC 2d 190, 191 (1966)). *See also See Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179 (1986) (subsequent history omitted) (generally narrowing the range of non-FCC related misconduct to be considered when assessing an applicant's character qualifications to matters upon which there has been an adjudication by a tribunal of competent jurisdiction of a felony or certain other types of misconduct by the licensee and/or parties with an attributable interest in the licensee). Several Objectors also assert that the Licensee has filed numerous frivolous lawsuits and made false claims against them to various government agencies. Because these allegations fail to implicate any violation of the Act or the Rules and have not otherwise been adjudicated by a court or administrative body, we will not consider them further. *Id.*

²⁰ *See Repeal or Modification of the Personal Attack and Political Editorial Rules*, Final Rule, 65 FR 66643 (2000).

²¹ *Capstar TX Limited Partnership*, Memorandum Opinion and Order, 19 FCC Rcd 11303, ¶¶ 9, 10 (EB 2004) (quoting *Spanish Radio Network*, Memorandum Opinion and Order, 10 FCC Rcd 9954, 9959, ¶¶ 21-22 (1995)).

The information before us reflects that no local court of competent jurisdiction has found that any of the broadcasts at issue here met the "clear and present danger" test. Indeed, neither the Application nor any of the Petitions to Deny or Informal Objections filed reflect that any civil or criminal action of any kind has been brought against the Licensee or Stokes with respect to any of the complained-of broadcasts. Viewing these circumstances in light of the Commission's clear directive (quoted above) regarding treatment of broadcast speech that allegedly advocates or incites violence, we conclude that that Objectors have failed to establish a *prima facie* case that a grant of the Application would be inconsistent with Section 309(k) of the Act.²²

Indecency Objection. Petitioner Kate Hunt alleges that Stokes has repeatedly broadcast jokes about reversing the first letters of her first and last names (which essentially results in the words "Hate Cunt").²³ To support her allegation, Ms. Hunt provides a recording of a Stokes program allegedly aired over the Station.

The Commission defines indecent speech as language or material that, in context, depicts or describes, in terms patently offensive as measure by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. In determining whether the complained-of material is patently offensive, three factors are particularly relevant: (1) the explicitness or graphic nature of the description or images; (2) whether the material dwells on or repeats at length descriptions or sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock. The Commission applies these three factors as part of a balancing interest to determine if the material is indecent.

It is unclear from Ms. Hunt's Petition to Deny whether Stokes ever broadcast the phrase in question or only alluded to it. Upon our review of the materials submitted in this case, including the recording submitted by Ms. Hunt, we cannot affirmatively establish that the above-noted words were, in fact, uttered during a broadcast. In the recording, it appears that Stokes instead states Ms. Hunt's name on several occasions and jokingly notes that he must be cautious in pronouncing it correctly. Under the Commission's established analysis discussed above, such programming, in the context presented, is neither indecent nor profane.²⁴

Misrepresentation. MHRN argues that the Licensee has made false statements in its Opposition. For example, MHRN claims that Licensee falsely stated in its pleading that MHRN is a hate group, that its staff terrorizes Stokes and threatens the Station, and that it is affiliated with a domestic terrorist organization.²⁵ We find that these statements do not constitute willful and deliberate misrepresentation, but are matters of opinion that do not exceed the limits of advocacy.

²² See 47 U.S.C. § 309(d)(1).

²³ Hunt Petition at 3.

²⁴ See, e.g., *In The Matter Of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664, 2713 (2006), *vacated in part*, 21 FCC Rcd 13299 (2006) (holding that a sexual double entendre made through an animated lion character's statement, "Big Daddy's ready for lovin' ... it may be nine o'clock in New York, but right here it's mountin' time," was not indecent). See also *Complaints by Parents Television Council Against Various Broadcast Licensees*, Memorandum Opinion and Order, 20 FCC Rcd 1931 (2005), and Memorandum Opinion and Order, 20 FCC Rcd 1920 (2005) (references or innuendo alluding to sexual organs or activities held not to be patently offensive where they were not sufficiently graphic or explicit and were not repeated or dwelled upon).

²⁵ MHRN informal objection at 7-8. See also Neal Brown informal objection at 3 (urging the Commission to investigate the veracity of the statements made in the Opposition).

Other Nonbroadcast Actions. Several Objectors assert that the Station's Application should be denied because the corporation listed as the Licensee in the Application is not in good standing in the State of Montana.²⁶ Two Objectors further assert that the Licensee is financially unstable and has failed to meet its mortgage payments.²⁷

The Commission generally will not deny an application involving a commercial broadcast facility based on a licensee's or permittee's alleged non-compliance with state corporate law "when no challenge has been made in the state courts and the determination is one that is more appropriately a matter of state resolution."²⁸ The Objectors have failed to demonstrate that any such challenge has been made in the instant case. With regard to the Licensee's alleged financial instability, we find that the Objectors have failed to present properly supported specific allegations of fact to establish a *prima facie* case that a grant of the Application would be inconsistent with Section 309(k) of the Act.²⁹ Accordingly, further consideration on these issues is unwarranted.

Conclusion/Actions. For the foregoing reasons, we deny the Petitions to Deny and the Informal Objections filed by the Objectors. We have evaluated the Application pursuant to Section 309(k) of the Act,³⁰ and we find that the Station has served the public interest, convenience, and necessity during the subject license term. Moreover, we find that there have been no serious violations of the Act or the Rules involving the Station, or violations by the Licensee of the Act or the Rules which, taken together, would constitute a pattern of abuse. In light of the foregoing, we will grant the Application.

Accordingly, IT IS ORDERED That the Petitions to Deny and Informal Objections filed by the Objectors listed above ARE DENIED.

IT IS FURTHER ORDERED That the application of Skyline Broadcasters, Inc. for renewal of its license for Station KGEZ(AM) (File No. BR-20041130AMS) IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁶ Scott Nicolson informal objection at 1; MHRN informal objection at 7.

²⁷ Oliver G. Coburn Petition to Deny at 2; Neal Brown informal objection at 2.

²⁸ See *Abundant Life, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 4972, 4973 (2001), *appeal dismissed sub. nom. Unity Broadcasters v. FCC*, Case No. 01-1148 (D.C. Cir. 2002); *Fatima Response, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 18543, 18546 (1999), *recon. dismissed*, 15 FCC Rcd 10520 (2000); and *North American Broadcasting Co., Inc.*, Memorandum Opinion and Order, 15 FCC 2d 979, 983 (Rev. Bd. 1969).

²⁹ See 47 U.S.C. § 309(d)(1); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

³⁰ 47 U.S.C. § 309(k).

cc: Scott Nicolson
Neal Brown
Roger and Susan Sherman
Susan Waldron
Clark Reynolds
Oliver Coburn
Kate Hunt
Celeste McLean
Sheila Conners
Montana Human Rights Network
Keith Hammer
Lorney Jay Deist
Christine Kaufman
Ken Toole
Skyline Broadcasters, Inc.