



Federal Communications Commission
Washington, D.C. 20554

July 12, 2007

DA 07-3186
In Reply Refer to:
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Wine Country Broadcasting Company
c/o Tusker Corporation
3636 Buchanan Street
San Francisco, CA 94123

In re: Wine Country Broadcasting Company
KVON(AM), Napa, California
Facility ID: 74430
File No. BR-20050801CAQ

Application for Renewal of License

Dear Applicant:

We have before us the application of Wine Country Broadcasting Company (the "Licensee") to renew its license for Station KVON(AM) (the "Station") filed on August 1, 2005. We also have before us (1) an informal objection to the above-captioned application filed by Mr. and Mrs. David Kernberger (the "Kernbergers") on November 4, 2005; and (2) an opposition to the informal objection filed by the Licensee on December 23, 2005. For the reasons discussed below, we deny the informal objection and grant the renewal application.

Background. The Kernbergers claim that the renewal application should be denied because: (1) the Station no longer carries "community/family oriented" programming; and (2) the Station does not raise its power at the appropriate time each morning. In response, the Licensee states that the Kernbergers have only criticized the Station's "exercise of its editorial discretion in making programming choices" and have not shown that the Licensee has violated the Commission's Rules (the "Rules") or the Communications Act of 1934, as amended, (the "Act").¹ The Licensee admits in its Opposition that it is "aware of instances when the KVON transmitter output power was increased somewhat later than the appointed hour in its post-sunrise authorization" and has since taken steps to correct this problem.²

Additionally, in its renewal application, the Licensee admits that the Station's 2004 EEO Annual Public File Report was not placed in the Station's public file on time. The Licensee states that it has since corrected this "inadvertent oversight."

Discussion. Informal objections must, pursuant to Section 309(e) of the Act,³ provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that

¹ Opposition at 4.

² Opposition at 7.

³ 47 U.S.C. § 309(e).

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 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 allegations. The Kernbergers state that the Station fails to provide community and family oriented programming and that many of the programs broadcast are offensive and insulting to the listening audience. While we recognize the Kernbergers’ concerns about the quality of the Station’s programming, the role of the Commission in overseeing program content is limited. The First Amendment to the United States Constitution and Section 326 of the Act⁷ 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. However, we note that the Kernbergers have not alleged nor has the Station been found to have violated these statutes.

Moreover, 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.⁸ A licensee has broad discretion – based on its right to free speech -- to choose, in good faith, the programming that it believes serves the needs and interests of the members of its audience.⁹ We will intervene in programming matters only if a licensee abuses that discretion.¹⁰ The Kernbergers have not demonstrated that the station has done so here.

Unauthorized operation allegations. The Kernbergers state that “[a]s the Station has gone to more automated controls... the Station often doesn’t raise power at the appropriate time in the

⁴ 47 U.S.C. § 309(k). 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 47 U.S.C. §326.

⁸ See *WGBH Educational Foundation*, Memorandum Opinion and Order, 69 FCC 2d 1250, 1251 (1978).

⁹ 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)).

¹⁰ *Philadelphia Station License Renewals* at 6401.

morning.”¹¹ The Licensee admits that “[t]he Station is aware of instances when the KVON transmitter output power was increased somewhat later than the appointed hour in its post-sunrise authorization”¹² but that the problem has since been remedied.

The Commission’s Rules are clear that a broadcast licensee must operate “at times, or with modes or power” specified in the station’s license.¹³ However, we have before us no specific facts indicating that the Licensee’s failure to increase the Station’s operating power as specified in the KVON(AM) authorization are anything other than isolated occurrences that do not warrant the imposition of a forfeiture or other sanction.¹⁴ The Licensee is reminded of its obligation to comply with all of the terms of its license under Section 73.1745(a) of the Rules and that failure to comply with the rule may result in appropriate enforcement action.

Public file violation. In Section III, Question 3 of its renewal application, the Licensee admits that it failed to place the Station’s 2004 EEO Report in the public file in a timely manner. Section 73.3526 of the Rules¹⁵ requires broadcast licensees to maintain a public inspection file containing specific types of information related to station operations. The purpose of this requirement is to provide the public with timely information at regular intervals throughout the license period.¹⁶ In this regard, where lapses occur in maintaining the public file, neither the negligent acts nor omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee’s rule violation.¹⁷ We do not condone the Licensee’s failure to timely file the EEO Report in the public inspection file. However, it appears from the information before us that the omission of the 2004 EEO Report was an isolated and inadvertent violation of the public inspection file rule. Such a *de minimis* violation of Section 73.3526 of the Rules does not warrant further consideration in connection with the Station’s renewal application.¹⁸ Once again, however, the Licensee is reminded of its responsibility to comply with all of the Rules and the Act.

¹¹ Objection at 1.

¹² Opposition at 7.

¹³ 47 C.F.R. § 73.1745(a).

¹⁴ We note, for example, that no compounding factors, such as the creation of air navigation hazards or radio interference, were created by the Licensee’s failure to bring KVON(AM) up to full daytime power at the specified times. *See, e.g., Letter to Lauren A. Colby, Esq.*, 21 FCC Rcd 1248 (MB 2006) (unauthorized construction of facilities less than those authorized not compounded by creation of air navigation hazard or interference).

¹⁵ 47 C.F.R. § 73.3526.

¹⁶ *Cf. Letter to Kathleen N. Benfield from Linda B. Blair, Chief, Audio Services Division* (April 3, 1997), 13 FCC Rcd 4102 (1997) (citing *License Renewal Applications of Certain Commercial Radio Stations*, 8 FCC Rcd 6400 (1993)).

¹⁷ *See Padre Serra Communications, Inc.*, Letter Decision, 14 FCC Rcd 9709, 9714 (MMB 1999) (citing *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970) and *Eleven Ten Broadcasting Corp.*, Notice of Apparent Liability, 33 FCC 706 (1962)).

¹⁸ *See Sarkes Tarzian, Inc.*, Memorandum Opinion and Order, 65 FCC 2d 127, 132 (1977) (“isolated and inadvertent rule violation” raised no question of the fitness of the applicants for renewal, and licensee admonished the licensees to henceforth “scrupulously” observe the public inspection file rule”).

Conclusion/Actions. We have evaluated the Licensee's renewal application pursuant to Section 309(k) of the Act, and 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.

In light of the above discussion, and pursuant to Section 309(k) of the Communications Act of 1934, as amended, and Sections 0.61 and 0.283 of the Commission's Rules,¹⁹ the Informal Objection filed by Mr. and Mrs. David Kernberger IS DENIED, and the application (File No. # BR-20050801CAQ) of Wine Country Broadcasting Company for renewal of its license for Station KVON(AM), Napa, California, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Margaret L. Tobey, Esq.
Mr. & Mrs. David Kernberger

¹⁹ 47 U.S.C. § 309(k); 47 C.F.R. §§ 0.61, 0.283.