Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re:	)	
	)	
Application of CBS Television Stations, Inc.	)	BRCT-20041001AJQ
for Renewal of License of	)	
WFOR-TV, Miami Florida	)	47902

OPPOSITION TO APPLICATION FOR REVIEW

CBS Television Stations Inc. ("CBS" or "Licensee") hereby submits its opposition to an application for review, filed by the Office of Communication of the United Church of Christ ("UCC" or "Petitioner"), from the Media Bureau's (the "staff") dismissal of its petition to deny (the "Petition") the license renewal application of WFOR-TV, Miami, Florida (the "Staff Decision").

Petitioner contends that the Staff Decision broke new ground in determining that the gravamen of the Petition – namely, the CBS Television Network's rejection of an editorial advertisement proferred by UCC – was not a matter concerning the particular station up for renewal, and was therefore not cognizable under Section 309 (k) of the Communications Act. Arguing that this holding was not only novel but wrong, UCC urges the Commission to consider the "merits" of its claims.

We believe that that the staff was correct in ruling that the network's refusal to air Petitioner's commercial – which UCC was invited to, but did not, submit to WFOR – did not pertain to the station, and was therefore irrelevant to its renewal application as a

threshold matter. Nonetheless, we have no objection to the Commission's considering the Petition on its merits, since UCC's claims are manifestly without substance.

BACKGROUND

In November 2004, UCC submitted the advertisement in question, titled "Night Club," to the CBS Television Network. The announcement depicted would-be worshipers approaching a church, access to which is impeded by a velvet rope attended by two muscular, black-clad "bouncers." Two men, briefly seen to be holding hands, approach and are brusquely turned away by the bouncers with the words "no, step aside please." After the rope is unhooked to admit a white, heterosexual couple, the bouncers stop a Hispanic-appearing young man, telling him "no way, not you." Next they deny entrance to an African-American young woman, saying to her sarcastically "I don't think so." A superimposed message then appears against a black background, stating "Jesus didn't turn people away ... Neither do we." The announcement ends with several shots of diverse congregants (including an elderly couple, a black couple and a lesbian couple) and a voice-over message emphasizing that the United Church of Christ welcomes all.

The CBS Television Network declined to accept this commercial, citing its policy against editorial advertising. However, in subsequent conversations with two officials of the UCC, Dennis Swanson, then Chief Operating Officer of the CBS Television Stations Group ("CTS"),[1] invited UCC to submit the commercial to individual CBS owned

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[1] At the time of the events in question, Viacom Inc. ("Viacom") was the parent company of the licensees of WFOR-TV and the other television stations in what was then known as the Viacom Television Stations Group. As of December 31, 2005, Viacom effected a corporate reorganization in which the name of the ultimate parent company of those licensees was changed to CBS Corporation. For convenience, that parent company is referred to above as "CBS," regardless

stations, including WFOR-TV. This offer reflected CTS's policy to leave decisions as to whether to accept particular editorial advertisements to the individual discretion of each station.[2] Despite Mr. Swanson's offer, the commercial was never submitted to WFOR.

The instant Petition followed. In rejecting it, the Media Bureau observed that "WFOR-TV may have chosen to air the spot had it been offered the opportunity." In

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of whether the reference is to a time before or after the above corporate reorganization.

2 *See, Opposition of CBS Television Stations Inc. to Petition to Deny*, BRCT-20041001AJQ, Declaration of Dennis Swanson (filed January 10, 2005). Although seemingly at odds, the independently-determined policies of the CBS Television Network and the CBS Television Stations Group with respect to editorial advertising reflect similar considerations. Both policies stem from a belief that decisions as to the acceptability of commercials that some viewers might find controversial or offensive are best made on a local level, by managers whose job it is to know their communities. This view underlies the CBS Television Network's policy of not accepting editorial advertisements, since doing so would effectively determine, for each of some 190 independently-owned affiliated stations, whether potentially sensitive national ads would appear locally on their air. On the other hand, since no risk of compromising local autonomy is presented when spot buys are made individually on the CBS owned television stations, the CBS Television Stations Group has no general policy against accepting issue advertising.

The UCC commercial at issue illustrates why the CBS Television Network believes it appropriate that such decisions be made on the local level, rather than by a national network. While the UCC spot was no doubt intended to convey a message of inclusiveness, a broadcaster would not be unreasonable to think that some viewers might perceive it as having less benign implications. For instance, might members of a denomination opposed to gay marriage see in the spot an offensive suggestion that their church's beliefs were tantamount to refusing spiritual succor to individuals in need, in a manner fundamentally incompatible with Christian tenets? Might members of that church also feel that they were being unjustly tarred with the brush of racism? The point is not whether such interpretations would be warranted, but that the issues raised by editorial commercials of this kind can be extremely sensitive. The CBS Television Network's policy of leaving decisions as to whether to air such spots to the respective managements of its local affiliates can thus hardly be characterized as arbitrary.

light of this fact, and Congress' "express[ ] limit[ation]" of the scope of the license renewal inquiry "to matters occurring at the particular station for which license renewal is sought," [3] the staff dismissed UCC's allegations as not pertaining to WFOR-TV.

As we show below, the staff's holding in this regard reflects a logical interpretation of Congress' mandate that the Commission grant a station's renewal application upon making the requisite findings "*with respect to that station.*" [4] But this case does not turn on whether or not the Media Bureau should have reached the "merits" of Petitioner's claims.

Thus, where the Commission finds that a station has served the public interest, Section 309(k) of the Communications Act directs that it grant license renewal if it also finds that (1) there have been no serious violations of the Act or the FCC's rules and (2) there have been no other violations of the Act or rules which, taken together, would constitute a pattern of abuse. [5] Here, Petitioner has failed to make a *prima facie* showing of *any* violation of the Act or rules -- serious or trivial, isolated or part of a pattern or practice. To the contrary, the CBS Television Network's rejection of Petitioner's ad involves nothing more than the "selection and choice of material" that the U.S. Supreme Court has found to be at the heart of the editorial function, and thus protected by the Communications Act and the First Amendment.[6]

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3 Staff Decision, citing *SagittariusBroadcasting Corp.*,18 FCC Rcd 22551 (2003).

4 47 USC § 309(k).

5 *Id.*

6 *See, Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 124 (1973) ("For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors -- newspaper or broadcast

ARGUMENT

I. THE STAFF CORRECTLY HELD THAT PETITIONER'S ALLEGATIONS DID NOT PERTAIN TO WFOR-TV, AND THUS WERE NOT COGNIZABLE UNDER SECTION 309(K) OF THE ACT.

Petitioner argues that the staff's decision must be erroneous, since otherwise network misbehavior could not be considered in the context of the renewal application of a network owned or affiliated station. If the staff decision stands, UCC contends, decades of Commission precedent holding stations accountable for their broadcast of network programming would be eviscerated, and network violations of the Commission's rules and policies concerning such matters as indecency and children's television could not be considered in the license renewal process.[7]

The staff's decision suggests no such thing. Commission precedent has long held that licensees are responsible for *all* programming they broadcast, whatever its source. But that does not mean that a network's decision *not* to broadcast certain programming may properly be attributed to a network station in a license renewal proceeding, consistent with the mandate of Section 309 (k).

For the sake of argument, let us assume – contrary to the Supreme Court's decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee* [8] -- that broadcasters were obligated to air editorial advertising. Even if such an obligation

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-- can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided.") *See also Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974).

7 Application for Review at 6-7.

8 412 U.S. 94 (1973) (hereafter "*CBS v. DNC*").

existed, how could a *network's* decision to decline such advertising possibly pertain to the record of an independently-owned affiliate that was willing to accept it?

The case is not different as to a network owned-and-operated station. For even if a requirement to accept editorial advertising could somehow be read into the public interest standard of the Communications Act -- again, contrary to directly applicable Supreme Court precedent – an additional leap would be necessary to hold that the obligation could not adequately be discharged by the local O&O, but would mandate the sale of network time. Petitioner's preference for purchasing time on a network basis, rather than through national spot or local buys,[9] could not reasonably sustain a further expansion of an already tenuous interpretation of the Act.

The staff was therefore correct in holding that the allegations of the Petition did not pertain to WFOR-TV, given that UCC made no attempt to secure advertising time on that station, although expressly invited to do so. But the Commission need not affirm the Media Bureau's decision on this narrow ground, since Petitioner's underlying claims are entirely specious.

II. THE SUPREME COURT HAS HELD THAT THE COMMUNICATIONS ACT DOES NOT REQUIRE BROADCASTERS TO SELL TIME FOR EDITORIAL ADVERTISING, AND RESORT TO THE ACT'S "PUBLIC INTEREST" STANDARD CANNOT EVADE THAT HOLDING.

In *CBS v. DNC*, the Supreme Court expressly held that neither the Communications Act nor the First Amendment obligates a broadcaster to accept editorial advertising. The Court noted that Congress had "time and again rejected various legislative attempts that would have mandated a variety of forms of individual access,"

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[9] *See,* Application for Review at 5.

choosing instead "to leave such questions with the Commission." [10] As the Court observed, "Congress specifically dealt with -- and firmly rejected -- the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." [11]

In the face of this controlling decision, the Petition nonetheless argues that a requirement to accept editorial advertising is "inherent in the public interest standard." [12] Seeking to distinguish *CBS v. DNC*, the Petition contends that the existence of the fairness doctrine, which the Commission has since repealed, was central to the *DNC* holding. This argument in turn rests on an attempt to transform the Court's discussion of the fairness doctrine, as an aspect of the regulatory scheme it upheld in *DNC*, into a necessary condition of its decision. Given the Court's emphatic finding that Congress "time and again" rejected the creation of access rights in originally adopting the Communications Act of 1934 – the enactment of which preceded by some 15 years the Commission's first enunciation of the fairness doctrine [13] -- this interpretation plainly makes no sense.

Indeed, the U.S. Court of Appeals for the D.C. Circuit has already expressly rejected attempts to discover in the Communications Act implicit requirements akin to those of the fairness doctrine, and those asserted in the Petition. Thus, in upholding the

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10 *CBS v. DNC*, *supra*, 412 U.S. at 122.

11 *Id.* at 105. To the contrary, the Court found it "clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." *Id.* at 110.

12 Petition at 5.

13 *See, Report on Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949).

Commission's decision to eliminate the fairness doctrine in *Syracuse Peace Council v. FCC*, [14] the Court noted that no party had suggested that the doctrine was constitutionally compelled; likewise, it found that its prior decision in *Telecommunications Research & Action Center v. FCC* ("*TRAC*") [15] precluded any contention that the doctrine was statutorily mandated. In so holding, the Court also rejected the claim of some parties that the public interest standard of the Communications Act necessarily included the fairness doctrine, finding this argument to be "in essence an effort to ask this panel to overturn *TRAC*."[16]

The Petition asks the FCC to engage in similar self-contradiction when it assures the Commission that its claim "is ***not*** based on . . . the fairness doctrine" (emphasis in the original), [17] and then proceeds to posit a supposed obligation that is completely indistinguishable from it. Thus Petitioner asserts that "[i]n the absence of the Fairness Doctrine, the Commission must now craft another approach to deal with the flat refusal to carry speech on controversial issues." [18] Leaving aside the fact that Petitioner has not made any showing of such a "flat refusal" by WFOR, the approach that Petition asks the Commission to "craft" is virtually identical to the so-called "first prong" of the fairness doctrine, which required that "broadcasters provide coverage of important

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14 867 F.2d 654 (D.C. Cir 1989), *cert. denied,* 493 U.S. 1019 (1990) (hereafter "*Syracuse Peace Council*").

15 801 F.2d 501 (D.C.Cir. 1986), *reh'g en banc denied*, 806 F.2d 1115, *cert. denied*, 482 U.S. 919 (1987) (hereafter "*TRAC*").

16 *Syracuse Peace Council, supra,* 867 F.2d at 657, n.1.

17 Petition at 5.

18 *Id.* at 7.

controversial issues of interest to the community they serve."[19] That part of the fairness doctrine, as well as the more familiar requirement that contrasting views be presented on controversial issues that a broadcaster chooses to cover, was also repealed by the Commission, with its elimination being affirmed by the Court of Appeals.[20] Accordingly, just as the petitioners in *Syracuse Peace Council* -- in arguing that the fairness doctrine inhered in the public interest standard of the Communications Act -- effectively asked the D.C. Circuit to overturn its prior holding that the doctrine was not statutorily mandated, Petitioner in this case seeks the Commission's reinstatement of the first prong of the fairness doctrine on the ground that it is required by the statute after all. This argument merits the same response as that afforded by the Court of Appeals to the petitioners in *Syracuse Peace Council* – i.e., summary dismissal.

CONCLUSION

Petitioner has failed to allege the violation by CBS of any existing Commission rule or policy, or any specific provision of the Communications Act. Moreover, the courts have authoritatively rejected its argument that an obligation to accept editorial advertising inheres in the public interest standard. [21] In these circumstances, it has

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19 *Syracuse Peace Council, supra,* 867 F.2d at 666-67.

20 *Id.* at 666-69.

21 In any event, the Commission's ennuciation of previously unspecified components of the public interest standard would be inappropriate in this license renewal proceeding. The proper forum for the adoption of new rules and policies is a notice-and-comment rulemaking proceeding, not an adjudication concerning the qualifications of an individual applicant for license renewal. *See, California Association for the Physically Handicapped v. FCC*, 840 F.2d 88, 97 (D.C. Cir. 1988) (in view of the "arbitrariness of retroactive application and the inherent constraints of the adjudicatory process," the Commission has viewed adjudicatory

plainly failed to meet the requirements of Section 309(d) of the Act for setting forth a *prima facie* case for non-renewal of WFOR-TV's license.[22] On that ground, in addition to the staff's correct finding that the Petition's allegations do not even pertain to WFOR-TV, the Application for Review should be denied.

Respectfully submitted,

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proceedings as an inappropriate forum for promulgating closed-captioning requirements, an approach repeatedly upheld by the Supreme Court).

22 Section 309 (d) requires that a petition to deny "contain specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with . . . subsection (k) in the case of renewal of any broadcast station license." As indicated above, subsection (k) requires the Commission to grant renewal if it finds that the station in question "has served the public interest, convenience, and necessity"; that "there have been no serious violations by the licensee of th[e] Act or the rules and regulations of the Commission"; and that "there have been no other violations by the licensee of th[e] Act or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse." 47 USC § 309 (d), (k).

CERTIFICATE OF SERVICE

I, Howard F. Jaeckel, hereby certify that on this 24th day of September, 2007, I caused copies of the foregoing "Opposition to Application for Review" to be served by U.S. First Class Mail, postage prepaid, on:

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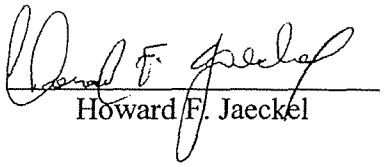

Howard F. Jaeckel

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