



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to:
1800B3-AR

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In re: **Dontron Inc.**
WPWX(FM), Hammond, Indiana
Facility ID No. 17304
Application File No. 0000108172

Petition for Reconsideration

Dear Parties:

We have before us the application of Dontron Inc. (Dontron) for renewal of its license for station WPWX(FM), Hammond, Indiana (Application).¹ We also have before us a pleading filed by Clear the Airwaves Project (CTAP) against the Application; which we will treat as a petition for reconsideration (Petition) of the Bureau's grant of the WPWX license renewal application.² As discussed below, we dismiss the Petition as procedurally defective.

Background. Dontron timely filed the Application on March 17, 2020. Media Bureau (Bureau) staff granted the Application on July 16, 2020. On August 11, 2020, CTAP filed the Petition. Dontron filed an Opposition to Petition for Reconsideration on August 20, 2020 (Opposition).³ CTAP filed a reply to the Opposition on August 25, 2020 (Reply).⁴

¹ Application File No. 0000108172 (filed Mar. 17, 2020.).

² Petition, Pleading File No. 0000120300 (filed Aug 11, 2020). CTAP's pleading also objects to grant of the pending license renewal application of AMFM Broadcasting Licenses, LLC, for renewal of its license for station WGCI(FM), Chicago, Illinois, Application File No. 0000118922 (filed Jul. 29, 2020), Pleading File No. 0000120299 (filed Aug 11, 2020). We will process the WGCI(FM) renewal application by separate action when resolution of an unrelated matter makes it possible to issue a decision as to the outcome of that application.

³ Opposition, Pleading File No. 0000120615 (filed Aug. 20, 2020).

⁴ Reply, Pleading File No. 0000136793 (filed Aug. 25, 2020).

In the Petition, CTAP argues the Application should be denied and the WPWX license revoked because: 1) WPWX is operating in “continued violation of the FCC Standards of Decency;”⁵ and 2) airs obscene, vulgar, and violent content that promotes shootings, gang violence, and drug use, and includes sexually graphic lyrics.⁶ Although CTAP included some brief, excerpted quotations of lyrics from songs that it claimed WPWX, WGCI and “other similarly-formatted stations across the country”⁷ aired, CTAP’s Petition did not specify any dates or times of broadcasts, did not provide any recordings of broadcasts, and did not specify whether its quotations were lyrics from songs as aired by WPWX, or were lyrics of the versions of these songs not intended for broadcast by radio stations.⁸

In the Opposition, Dontron maintains that procedurally CTAP does not have standing to file a petition for reconsideration because: 1) it did not file an objection or petition to deny before July 1, 2020 and therefore is not a party to the proceeding;⁹ 2) CTAP has not demonstrated that its interests are aggrieved or adversely affected;¹⁰ and 3) CTAP’s pleading is speculative and claims that youth in Chicago are harmed by content airing on WPWX, however WPWX is licensed to serve Hammond, Indiana, not Chicago.¹¹ Substantively, Dontron asserts that in addition to the CTAP pleading lacking specificity or factual evidence: 1) the Commission is prohibited from censoring program material or interfering with broadcasters’ free speech rights;¹² 2) WPWX did not broadcast the lyrics listed in CTAP’s pleading, and moreover, WPWX avoids broadcasting impermissible language by using radio edited versions that remove or modify problematic lyrics;¹³ and 3) station format and program selections do not prevent grant of license renewal.¹⁴

In its reply, CTAP: 1) argues its responsive pleadings are timely and requests waiver of section 1.106(b) standing requirements;¹⁵ 2) attaches song lists and lyrics allegedly played on WPWX between

⁵ Petition at 1.

⁶ *Id.* at 2-3.

⁷ *Id.* at 1.

⁸ *Id.* CTAP’s Petition edited some words, without any indication of whether those edits were its own or were edits in songs as aired. The Petition also did not attempt to distinguish between broadcasts by WPWX, WGCI, or “similarly-formatted stations” that are not the subject of the Petition, claiming that its quotations were “just a sample of lyrics being played on these stations 24 hours a day, seven days a week.” *Id.* at 2.

⁹ Opposition at 2.

¹⁰ *Id.* at 2-3.

¹¹ *Id.* at 3-4.

¹² *Id.* at 5-6.

¹³ *Id.* at 6-7.

¹⁴ *Id.* at 7.

¹⁵ Reply at 1-4.

August 15, 2020 and August 21, 2020;¹⁶ and 3) maintains that WPWX has a history of broadcasting violent, obscene, indecent, and profane content.¹⁷

Under section 1.106(b)(1) of the Rules, a petition for reconsideration filed by a person that was not a party to the proceeding must demonstrate why participation in the earlier stages of the proceeding was not possible.¹⁸ CTAP requests a section 1.3 waiver of the Rules to ensure that CTAP has standing in this proceeding and argues that it filed the Petition as expeditiously as possible despite missing the July 1, 2020 deadline to file a petition to deny.¹⁹ CTAP ostensibly requests that we waive the section 1.106(b)(1) requirement by treating its Petition as timely filed prior to grant of the Application.

Discussion. Section 73.3516(e) of the Rules requires that petitions to deny a renewal application be filed by the first day of the last full calendar month of the expiring license term.²⁰ The deadline for filing a petition to deny the Application was July 1, 2020. We interpret CTAP's waiver request as a request to waive the deadline for filing a petition to deny under section 73.3516(e).²¹ An applicant seeking a waiver "faces a high hurdle."²² It must establish that deviation from the general rule is warranted by special circumstances and will serve the public interest.²³ CTAP filed the Petition over one month after the deadline for filing a petition to deny and, while it asserts the Petition was filed as expeditiously as possible, submits no evidence demonstrating why it was unable to timely file a petition to deny. We do not find that the circumstances in this case justify grant of a waiver. Since CTAP's pleading was filed after grant of the Application, we will treat it as a petition for reconsideration.

If a petition for reconsideration is filed by a person who was not a party to the proceeding, it shall show good reason why it was not possible to participate in the earlier stages of the proceeding.²⁴ CTAP provides no evidence demonstrating why participation was not possible while the Application was pending from March 17, 2020 to July 16, 2020. CTAP also maintains that it filed the Petition as expeditiously as possible, but has not provided any evidence or explanation of why it was unable to timely participate in the proceeding when the Application was pending for four months. For these

¹⁶ *Id.* at 4-8. Many of the songs described in the reply pleading were not addressed in either the Petition or in the Opposition. We will strike from the record and decline to consider this material, because it involves factual matters raised for the first time in the reply pleading. 47 CFR § 1.45(c). CTAP also refers to two 2018 audio recordings of songs that were not addressed in either the Petition or the Opposition. Reply at 8. We will strike from the record and decline to consider this material, because it involves factual matters raised for the first time in the reply pleading. 47 CFR § 1.45(c).

¹⁷ *Id.* at 8-9.

¹⁸ 47 CFR § 1.106(b)(1).

¹⁹ Reply at 1.

²⁰ 47 CFR § 73.3516(e).

²¹ Reply at 1-2. *See also* 47 CFR § 1.3 (rule may be waived "for good cause shown").

²² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*).

²³ *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio*, 418 F.2d at 1157-59.

²⁴ 47 CFR § 1.106(b)(1).

reasons, we dismiss the Petition as procedurally defective.²⁵ Even if we were to consider the Petition, it would be denied for the reasons discussed below.

CTAP alleges that Dontron is operating station WPWX in violation of law because it broadcasts obscene, indecent, and profane content that promotes violence and drug use. We address these categories below.

Obscenity. Section 1464 of title 18 of the United States Code prohibits the broadcast of "obscene" language.²⁶ The Supreme Court of the United States has held that to be obscene: 1) an average person, applying contemporary community standards, would find that the material, as a whole, appeals to the prurient interest; 2) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law; and 3) the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁷

Indecency. 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.²⁸

Profanity. The Commission has defined profanity as "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance."²⁹ Due to "the sensitive First Amendment implications in this area," the Commission limited its regulation of profane language to "the universe of words that are sexual or excretory in nature or are derived from such terms."³⁰ However, even that limited definition was invalidated by the Court of Appeals for the Second Circuit.³¹ While the Commission has "recognize[d] that additional words, such as language conveying racial or religious

²⁵ We do not agree with Dontron's argument that CTAP has failed to show it is an aggrieved party for purposes of establishing standing under 47 U.S.C. § 405. See *supra* note 10 and associated text. The Petition contains a showing of support from many residents of the WPWX service area, thereby establishing standing under the Commission's case law. See, e.g., *Tabback, Chet-5*, and *Punjabi American Media, LLC*, Memorandum Opinion and Order, 35 FCC Rcd 6869, 6871, para. 7 (2020).

²⁶ 18 U.S.C. § 1464. See also 47 U.S.C. § 503(b)(1)(D).

²⁷ *Miller v. California*, 413 U.S. 15, 24 (1973).

²⁸ *Mark N. Lipp, Esq.*, Letter Order, 22 FCC Rcd 21429, 21435 (MB 2007).

²⁹ *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, 2669, para. 17 (2006) (2006 *Indecency Order*), partially vacated and revised, 21 FCC Rcd 13299 n.121 (2006), *rev'd*, *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 461-462 (2d. Cir. 2007), *rev'd and remanded*, 552 U.S. 502 (2009).

³⁰ See *id.*

³¹ See *id.* The Commission did not further defend its finding that the vulgar language at issue in *Fox* was profane. See *Fox Television Stations v. FCC*, 613 F.3d 317, 327 n.7 (2d Cir. 2010), vacated and remanded, 132 S. Ct. 2307 (2012).

epithets, are considered offensive by most Americans,” it made clear its intent “to avoid extending the bounds of profanity to reach such language given constitutional considerations.”³²

Drug Use. While the Commission has reminded broadcasters that they must make “reasonable efforts” to determine the meaning of a song’s lyrics prior to broadcasting content,³³ the Commission specifically clarified that it would not ban the broadcast of “drug-oriented” songs.³⁴ Further, the Commission has repeatedly maintained that its role in program content is very limited.³⁵

Promotion of Violence. The Commission may take enforcement action based on broadcast speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁶ The Commission declines to do so, however, unless a local court of competent jurisdiction has determined that the speech at issue meets the *Brandenburg* test.³⁷

We reject CTAP’s arguments in accordance with the First Amendment and section 326 of the Act, which prohibit the Commission from censoring program material or interfering with broadcasters’ free speech rights. The Commission has held that it will not take “adverse action on a license renewal application based only upon the subjective determination of a listener or group of listeners as to what constitutes appropriate programming.”³⁸ The Commission has also recognized that: “Licensees have broad discretion – based on their right to free speech – to choose, in good faith, the programming they believe serves the needs and interests of their communities.”³⁹ Finally, the Commission has held that “if

³² 2006 *Indecency Order*, 21 FCC Rcd at 2669, para. 18.

³³ *Yale Broad.*, 478 F.2d 594, 598 (D.C. Cir. 1973) (“It is beyond dispute that the Commission requires stations to broadcast in the public interest. In order for a broadcaster to determine whether it is acting in the public interest, knowledge of its own programming is required.”).

³⁴ *Licensee Responsibility to Review Records Before Their Broadcast*, Memorandum Opinion and Order, 31 FCC 2d 377, 378-79, paras. 4-6 (1971).

³⁵ See, e.g., *AMFM Radio Licenses, L.L.C.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 10751, 10752, para. 4 (2004); *Clear Channel Broad. Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1768, 1777, para. 16 (2004); *Saga Commc’n of New England, LLC*, Letter, 23 FCC Rcd 11008, 11010 (2008); *Infinity Media Corp.*, Letter, 23 FCC Rcd 1820, 1821 (2008); *The Greenwich Broad. Corp.*, Letter Order, 23 FCC Rcd 1692, 1693 (MB 2008).

³⁶ See *Citicasters Licenses, L.P.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 19324, 19331-32, para. 20 (MB 2007), citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

³⁷ See *Spanish Radio Network*, Memorandum Opinion and Order, 10 FCC Rcd 9954, 9959, paras. 21-22 (1995) (noting that “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” and explaining that “[l]ocal 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”).

³⁸ See *Citadel Broad. Co.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 7083, 7101, para. 41 (2007), citing *WGBH Educational Foundation*, Memorandum Opinion and Order, 69 FCC 2d 1250, 1251, para. 4 (1978).

³⁹ This holds true even if the material broadcast is insulting to portions of a station’s community. *Multicultural Radio Broad. Licensee, LLC*, Letter, 22 FCC Rcd 21429, 21434 (MB 2007), citing *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order 8 FCC

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.”⁴⁰ Accordingly, the Commission will intervene in programming matters only when a licensee is found to have abused its discretion.⁴¹

Under the Commission's established analyses discussed above, the language quoted in CTAP's pleadings is not obscene, indecent, or profane. CTAP's pleadings rely on discreet portions and brief lyric fragments of larger songs. CTAP's allegations are conclusory and based on its interpretation that the lyrics allegedly aired on WPWX hint at potentially vulgar or indecent content. However, the Commission has held that language using sexual double entendres and fleeting references or innuendo alluding to sexual organs or activities are not patently offensive.⁴² Moreover, WPWX maintains that if song lyrics contain expletives or potentially problematic language, radio-edited versions with altered or deleted lyrics are played instead.⁴³ Lastly, CTAP has not presented any evidence that a court has found that the lyrics in question incite violence under the *Brandenburg* test.

For the reasons described above and consistent with the First Amendment, section 326 of the Act, and the Commission's repeated statements that its “role in overseeing program content is very limited,”⁴⁴ we find that grant of the Application was appropriate.

Conclusion. We find that CTAP's Petition is procedurally defective, and moreover, if we were to consider the Petition, CTAP has not demonstrated that the Bureau erred in granting the Application. Therefore, we dismiss the Petition.

Accordingly, IT IS ORDERED, that the pleading, Pleading File No. 0000120300, filed by the Clear the Airwaves Project, treated as a petition for reconsideration of the July 16, 2020 grant of the

Rcd 6400, 6401, para. 7 (1993), and *Zapis Commc'ns Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 3888, 3889, para. 7 (MB 1992).

⁴⁰ *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).

⁴¹ *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).

⁴² See, e.g., *Complaints Regarding Various Television Broad. 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 Broad. 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).

⁴³ Opposition at 7 and 9, Statement of WPWX Program Director.

⁴⁴ See, e.g., *AMFM Radio Licenses, L.L.C.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 10751, 10752, para. 4 (2004); *Clear Channel Broad. Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1768, 1777, para. 16 (2004); *Saga Commc'n of New England, LLC*, Letter Order, 23 FCC Rcd 11008, 11010 (2008); *Infinity Media Corp.*, Letter Order, 23 FCC Rcd 1820, 1821 (2008); *The Greenwich Broad. Corp.*, Letter Order, 23 FCC Rcd 1692, 1693 (2008).

WPWX(FM), Hammond, Indiana license renewal application, Application File No. 0000108172, IS
DISMISSED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau