

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)

OPPOSITION OF CBS TELEVISION STATIONS INC TO PETITION TO DENY

CBS Television Stations Inc. ("CBS" or "Licensee") hereby submits its opposition to a petition to deny the license renewal application of WFOR-TV, Miami, Florida (the "Petition"), filed by the Office of Communication of the United Church of Christ ("UCC" or "Petitioner").

The Petition is based solely on UCC's chagrin that an editorial advertisement that it proffered for broadcast was not accepted by the CBS Television Network, which is under common ownership with the Licensee.¹ As discussed below, WFOR did not refuse to run UCC's advertisement; on the contrary, UCC was expressly invited to submit that message for consideration by WFOR and other Viacom-owned television stations. Thus

¹ Both the CBS Television Network and WFOR-TV are ultimately owned by Viacom Inc. WFOR-TV operates as part of the Viacom Television Stations Group, which owns 39 television stations nationally.

the conduct to which UCC objects does not even concern the station whose license is up for renewal, a fact that in itself compels dismissal of the Petition.²

Moreover, Petitioner does not even attempt to argue that the network's rejection of its ad constitutes a "serious violation" of the Communications Act or the FCC's rules -- thereby implicitly conceding that it cannot meet the requirements of Section 309 of the Act for stating a *prima facie* case against renewal.³ Of course, the instant facts do not involve *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.⁴

² Section 309 (k) of the Communications Act directs that the Commission shall grant a station's application for license renewal "if it finds, *with respect to that station,*" that

(A) the station has served the public interest, convenience, and necessity;

(B) there have been no serious violations by the licensee of this Act or the rules and regulations of the Commission; and

(C) there have been no other violations by the licensee of this Act or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.

47 USC § 309 (k) (emphasis added).

³ See, 47 USC § 309 (d), (k).

⁴ 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 -- 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).

BACKGROUND

In November 2004, UCC submitted the advertisement in question, titled "Night Club," to the CBS Television Network. The announcement depicts 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, Chief Operating Officer of the Viacom Television Stations Group ("VTSG"), invited UCC to submit the commercial to individual Viacom owned stations, including WFOR-TV. This offer reflected VTSG's policy to leave decisions as to whether to accept particular editorial advertisements to the individual discretion of each station. Despite Mr. Swanson's offer, the commercial was never submitted to WFOR.

Although seemingly at odds, the independently-determined policies of the CBS Television Network and the Viacom 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.⁵ On the other hand, since no risk of compromising local autonomy is presented when spot buys are made individually on the Viacom owned television stations, the Viacom Television Stations Group has no general policy against accepting issue advertising.

Petitioner complains that these policies do not ideally suit its advertising strategy.⁶ Be that as it may, they are entirely consistent with FCC policy and the Communications Act, and the editorial freedom for broadcasters that both are intended to foster.

⁵ 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 everyone may applaud the message of inclusiveness in the UCC spot, a broadcaster would not be unreasonable to think that some viewers might see in 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.

⁶ See Petition at 3, n.2.

ARGUMENT

As noted above, UCC does not contend that any existing FCC rule or policy requires a broadcaster to accept editorial advertisements. Nor does it claim the airing of such commercials is compelled by any specific provision of the Communications Act, apart from its assertion that such a mandate is “inherent in the public interest standard.”⁷ Under Section 309 of the Act, Petitioner’s failure to allege specific violations of the statute or the Commission’s rules is fatal to its claims.⁸

Nor is this the proper setting for the Commission to announce previously unspecified components of the public interest standard. The appropriate 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.

Thus in *California Association for the Physically Handicapped v. FCC*,⁹ the U.S. Court of Appeals for the D.C. Circuit strongly endorsed the Commission's refusal to permit the adjudicatory process to be used as a substitute for rulemaking. In that case, an organization representing the physically handicapped filed a petition to deny the license

⁷ *Id.*

⁸ 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, *see* note 2 *supra*, 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).

⁹ 840 F.2d 88 (D.C. Cir. (1988) (hereafter "*California Association*").

renewal applications of all Los Angeles television stations on the ground, *inter alia*, that they had failed to caption a sufficient number of their programs for the hearing impaired.¹⁰ Finding that license renewal proceedings were an inappropriate setting for establishing a captioning requirement, the Commission dismissed the petition and granted the applications. The Court of Appeals affirmed, noting that

The Commission has repeatedly taken the position that adjudicatory proceedings are an inappropriate forum for promulgating captioning requirements because of the arbitrariness of retroactive application and the inherent constraints of the adjudicatory process. The Supreme Court [has] upheld this approach ... stating that "rulemaking is generally a 'better, fairer, and more effective' method of implementing a new industry-wide policy than is the uneven application of conditions in isolated license renewal proceedings."¹¹

But even if a license renewal proceeding were thought to be an appropriate vehicle for considering Petitioner's arguments, it is clear that they are without substantive merit. Indeed, Petitioner's claim that a right inheres in the Communications Act to purchase time on a broadcast station for editorial advertising has already been expressly rejected by the Supreme Court.

Thus, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,¹² the Court held that neither the Act nor First Amendment affords such a

¹⁰ Since the court's decision in *California Association*, the Commission has adopted rules concerning the captioning of programming for hearing-impaired viewers. See, *Report and Order, In the Matter of Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176, 13 FCC Rcd 3272 (1997).

¹¹ 840 F.2d at 97 (citations omitted).

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

right. The Court noted that Congress had “time and again rejected various legislative attempts that would have mandated a variety of forms of individual access,” choosing instead “to leave such questions with the Commission.”¹³ 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.”¹⁴

Petitioner’s efforts to avoid the dispositive effect of the Court’s decision in *CBS v. DNC* are unavailing. Seeking to distinguish the case, Petitioner argues 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 doctrine¹⁵ -- 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 here by Petitioner. Thus, in upholding

¹³ *Id.* at 122.

¹⁴ *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.

¹⁵ *See, Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949).

the Commission's decision to eliminate the fairness doctrine in *Syracuse Peace Council v. FCC*,¹⁶ 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")¹⁷ 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."¹⁸

Petitioner 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),¹⁹ 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."²⁰ Leaving aside the fact that Petitioner has not made any showing of such a "flat refusal" by WFOR, the approach that Petitioner 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

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

¹⁷ 801 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*").

¹⁸ *Syracuse Peace Council*, *supra*, 867 F.2d at 657, n.1.

¹⁹ Petition at 5.

²⁰ *Id.* at 7.

controversial issues of interest to the community they serve.”²¹ That part of the fairness doctrine, as well as the more familiar requirement that contrasting views be presented on controversial issues that a broadcaster chose to cover, was also repealed by the Commission, with its elimination being affirmed by the Court of Appeals.²² 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, the UCC 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. The Commission’s response to UCC’s circular and illogical argument must be the same as that afforded by the Court of Appeals to the petitioners in *Syracuse Peace Council* -- i.e., summary dismissal.

In sum, the instant Petition reflects nothing more than UCC’s determination to inflict some penalty on Licensee -- even if mere inconvenience -- for the CBS Television Network’s decision not to broadcast its advertising. We respectfully suggest that not only should the Petition be dismissed, but UCC should be rebuked for making a wholly frivolous filing.

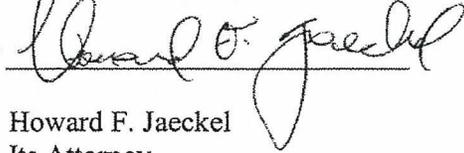
²¹ *Syracuse Peace Council, supra*, 867 F.2d at 666-67.

²² *Id.* at 666-69.

Respectfully submitted,

CBS TELEVISION STATIONS INC.

By

A handwritten signature in cursive script, appearing to read "Howard F. Jaeckel", written over a horizontal line.

Howard F. Jaeckel
Its Attorney

1515 Broadway
New York, New York 10036

January 10, 2005

DECLARATION

DENNIS SWANSON, under penalty of perjury, declares and states as follows:

1. I am the Chief Operating Officer of the Viacom Television Stations Group ("VTSG"), a business unit of Viacom Inc. ("Viacom"). WFOR-TV, Miami, Florida, operates as part of VTSG, and is licensed to CBS Television Stations Inc. ("CBS"), a wholly-owned subsidiary of Viacom.

2. To the best of my information and belief, the statements made in the attached "Opposition of CBS Television Stations Inc. to Petition to Deny" (the "Opposition") are true and correct. The statements made on page 3 of the Opposition regarding phone conversations I had with officials of the United Church of Christ -- namely, Everett Parker and Bob Chase -- are true and correct as of my personal knowledge.



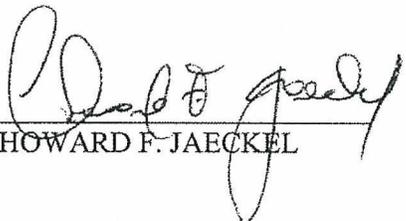
DENNIS SWANSON

January 10, 2005

DECLARATION

HOWARD F. JAECKEL, under penalty of perjury, declares and states as follows:

1. I am Vice President, Associate General Counsel, CBS Broadcasting Inc. ("CBS").
2. In that capacity, I am familiar with the facts and circumstances discussed in the attached "Opposition of CBS Television Stations Inc. to Petition to Deny."
To the best of my information and belief, the statements made therein are true and correct.


HOWARD F. JAECKEL

January 10, 2005

CERTIFICATE OF SERVICE

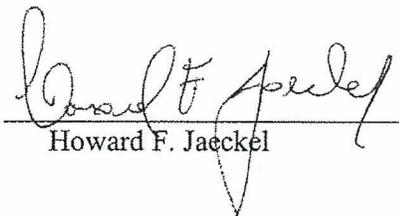
I, Howard F. Jaeckel, hereby certify that on this 10th day of January, 2005, I caused copies of the foregoing "Opposition of CBS Television Stations Inc. to Petition to Deny" to be served by U.S. First Class Mail, postage prepaid, on:

Andrew Jay Schwartzman, Esq.
Media Access Project
Suite 1000
1625 K Street, NW
Washington, DC 20006

I also certify that, on the same day, I caused said Opposition to be filed with, and served on, the following by hand delivery:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

Barbara Kreisman, Chief
Video Division
Federal Communications Commission
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Howard F. Jaeckel