

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Pacifica Foundation, Inc.	)	
	)	
Application for Renewal of License	)	File No. BRH-20140130ANC
WBAI(FM), New York, New York	)	Facility ID No. 51249
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 13, 2016**

**Released: December 14, 2016**

By the Commission:

1. We have before us the Application for Review (AFR) filed on August 30, 2016, by Daniel Miller (Miller), seeking Commission review of a Media Bureau (Bureau) decision<sup>1</sup> that denied Miller's Informal Objection (Objection) against WBAI's license renewal application (Renewal Application) and granted the Renewal Application.<sup>2</sup>

2. The AFR raises the same argument the Bureau rejected in the *Staff Decision*: that WBAI is broadcasting content that Miller finds objectionable. Miller does not specify dates or times at which the programming about which he complains was broadcast. Instead, Miller generally refers to alleged WBAI programming about an escaped fugitive who was involved in the shooting of a state trooper, which described the fugitive as a "hero."<sup>3</sup> Miller states that he does "not believe that this type of broadcasting falls into the free speech area,"<sup>4</sup> and disagrees with the conclusion in the *Staff Decision* that WBAI's programming decisions are protected under the First Amendment.<sup>5</sup>

3. We deny the AFR for the reasons stated in the *Staff Decision*. The Commission will not take adverse action on a license renewal application based upon the subjective determination of a listener or group of listeners that the station has broadcast purportedly inappropriate programming.<sup>6</sup> A licensee has broad discretion -- based on its right to free speech<sup>7</sup> -- to choose, in good faith, the programming it believes serves the needs and interests of its community of license.<sup>8</sup> Under Section 309(k) of the

<sup>1</sup> *In re License Renewal Application of WBAI(FM)*, Letter, Ref 1800B3-PPD (MB Aug. 3, 2016) (*Staff Decision*) (denying Informal Objections separately filed by Miller, Edward Manfredonia, and Marsha Vander Heyden).

<sup>2</sup> The *Staff Decision* also denied the Informal Objections filed by Edward Manfredonia and Marsha Vander Heyden.

<sup>3</sup> AFR at 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See *WGBH Educ. Found.*, Memorandum Opinion and Order, 69 FCC 2d 1250, 1251, para. 3 (1978).

<sup>7</sup> See U.S. Const. amend. I. See also 47 U.S.C. § 326, which prohibits the Commission from engaging in broadcast censorship or "interfer[ing] with the right of free speech by means of radio communications."

<sup>8</sup> See, e.g., *Mr. Robert Meshanko*, Letter, 22 FCC Rcd 4809, 4810 (MB 2007); *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401, para. 7 (MMB 1993) (*Philadelphia Station License Renewals*), citing *Time-Life Broad., Inc.*, Memorandum Opinion and Order, 33 FCC 2d 1081, 1082 (1972), and *Office of Comm'cns of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983)(subsequent history omitted).

Communications Act, we can deny an application for renewal of a broadcast station license only if we find, after notice and an opportunity for a hearing, that the station has failed to serve the public interest, convenience and necessity, committed a serious violation of the Act or rules, or committed a series of violations that constitute a pattern of abuse.<sup>9</sup> Miller has not made specific allegations of fact supported by affidavit showing that grant of the renewal application would be *prima facie* inconsistent with the standard set forth in Section 309(k).<sup>10</sup> Accordingly, we deny the AFR.

4. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by Daniel Miller, on August 30, 2016, IS DENIED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules.<sup>11</sup>

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

---

<sup>9</sup> 47 U.S.C. §309(k).

<sup>10</sup> 47 U.S.C. § 309(d)(1).

<sup>11</sup> 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(g).