



Federal Communications Commission
Washington, D.C. 20554

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Neil P. Reiff
Sandler, Reiff, Young and Lamb P.C.
1025 Vermont Ave., NW
Suite 300
Washington, DC 20005

Joan Stewart
Wiley Rein LLP
1776 K Street NW
Washington, DC 20036

Re: Application for Renewal of License of
WKYT-TV, Lexington, KY, Facility ID
No. 24914, File No. BRC DT-20130401AEG

Dear Counsel:

The Commission by the Chief, Video Division, Media Bureau, acting pursuant to delegated authority, has before it a timely Petition to Deny (the "Petition") filed by Daniel Logsdon seeking to deny the renewal of television station WKYT-TV, Lexington, Kentucky (the "Station"), licensed to Gray Television Licensee, LLC ("Gray" or "Licensee").¹ For the reasons stated below, we deny the Petition.

Background. The Petition seeks to deny the license renewal of the Station on the basis that the Licensee aired false and defamatory statements, which demonstrate that Gray is unfit to continue in its role as a public trustee of the airwaves. According to the Petition, in June 2013, Daniel Logsdon, the Chairman of the Democratic Party of Kentucky (the "Party") who was assisting candidate James Kay in the June 25, 2013 election to the Kentucky State House of Representatives, became aware that several television stations in the Lexington Demographic Market Area ("DMA") had broadcast a political advertisement paid for by the Republican State Leadership Committee that contained false statements about Mr. Kay. Specifically, the Petition claims that the advertisement falsely stated that Mr. Kay had "been in politics the whole time" since graduating from law school; that he was arrested for reckless driving; that he tried to get out of the arrest by pretending he was a lawyer; and that he asked for special treatment and lied.²

The Petition states that on June 17, 2013, an attorney for the Party sent a letter to each station in the DMA that the Party believed was airing the advertisement, asking them to stop carrying it because it contained libelous and slanderous statements about Mr. Kay. According to the Petition, that letter claimed that the advertisement was false because Mr. Kay has practiced law for several years and has not actually been in politics exclusively for his entire career; because he did not pass himself off as a practicing attorney at the time of the arrest and was truthful at all times relevant to the arrest; because the record does not show that he did ask for special treatment; and because he was arrested for speeding, not the greater offense of reckless driving, as a follow-up e-mail to the Station's attorney explained.

¹ File No. BRC DT-20130401AEG. The Petition was filed on July 1, 2013.

² Petition at 2.

The Petition further states that to Logsdon's knowledge, all of the other television stations in the Lexington DMA stopped airing the advertisement after receipt of the June 17 letter, except for the Station, which ignored further requests to stop airing programming containing false and defamatory statements about Mr. Kay. According to the Petition, Mr. Kay won the election, but the false statements have never been corrected and are defamatory and actionable under Kentucky law.³

The Petition alleges that Gray has abdicated its obligation to air responsible programming, which means that the public interest would not be served by allowing Gray to continue to control the Station's programming and that the Commission should deny the Application or designate the application for hearing.⁴ The Petition asserts that Gray must undertake a certain level of due diligence to confirm that the advertisements airing on its stations are not "illegal," and that the correspondence from the Party's attorney put Gray on notice that the Station should have ceased airing it. The Petition also argues that Gray should not be able to hide behind the "no censorship" safe harbor set forth in the Act, because Mr. Kay's opponent did not pay for the advertisement. Logsdon is concerned that if the license is renewed, Gray might air programming that would slander other candidates with whom Logsdon works in his capacity as party chairman.

Gray filed an Opposition, arguing that the allegations are insufficient to establish a *prima facie* showing that granting the license renewal would be inconsistent with the public interest, and that the Petition should be dismissed. Specifically, the Opposition asserts that Logsdon does not even claim that the Station has violated the Communications Act or any Commission rule, and that his complaint is only with the Station's decision to air certain programming – a choice that is the licensee's exclusively. The Opposition cites the Commission's repeated affirmation that licensees have broad discretion to choose programming that serves their communities' needs and interests,⁵ and that the subjective determination of a viewer as to appropriate programming does not warrant adverse action on a license renewal application.⁶ Gray explains that in response to the request to refuse the advertisement at issue, it followed its standard procedure to review the material provided to support each party's position, and then exercised its discretion in deciding to continue to air the spot.⁷ The Opposition also asserts that Logsdon lacks standing to file the Petition because, regardless of his claim to viewership of the Station, his sole complaint relates to his official Party responsibilities, which are outside of the Commission's area of responsibility.⁸

In his Reply, Logsdon asserts that he has standing as a viewer regardless of whether he filed in his capacity as chairman of a political party. Logsdon asserts that he filed the Petition "because the Station aired false statements about an individual that it *knew to be false*."⁹ The Reply does not dispute the

³ Petition at 3.

⁴ Petition at 3-4.

⁵ Opposition at 2 (citing *KGAN Licensee, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 2549 (MB Vid. Div. 2010)).

⁶ Opposition at 2 n.4 (citing *WHYY, Inc.*, Letter Order, 22 FCC Rcd 18636 (Aud. Div. MB 2007) ("*WHYY, Inc.*") (citing *WGBH Educational Foundation*, Memorandum Opinion and Order, 69 FCC 2d 1250, 1251 (1978)).

⁷ Opposition at 3. The Opposition includes an affidavit from Chris Mossman, the General Manager of the Station.

⁸ Opposition at 2 n.2.

⁹ Reply at 3 (emphasis in original).

applicability of the precedent cited by the Opposition, but argues that here, the Station has abused its discretion in its programming choices.¹⁰

Standing. Under the Communications Act of 1934, as amended (the “Act”), only a “party in interest” has standing to file a petition to deny.¹¹ The petition to deny must contain specific allegations of fact demonstrating that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience, and necessity.¹² The allegations of fact, except for those of which official notice may be taken, shall be supported by an affidavit of a person with personal knowledge of the facts alleged.¹³ Among the facts to be alleged is that the petitioner is a resident of the station’s service area and a regular viewer of the station.¹⁴

We find that the Petitioner has standing to file his Petition. Logsdon attaches a declaration that he is a resident of the Stations’ service area and a regular viewer of the Station. We disagree with the Station that the Petitioner lacks standing because “his only personal grievance relates to his responsibilities as a political party official – a matter that is clearly beyond the Commission’s area of responsibility.”¹⁵ As the Commission has previously explained, a petitioner does not need to make a separate showing that it has suffered an “injury in fact,”¹⁶ and there is no need to identify any grievance.

Standard of Review. Section 309(k)(1) of the Communications Act of 1934, as amended (the “Act”), states that the Commission shall grant a license renewal application 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 the Act or Commission Rules and regulations; and (c) there have been no other violations by the licensee of the Act or Commission Rules and regulations which, taken together, would constitute a pattern of abuse.¹⁷ If a petition to deny has been filed, the Commission applies a two-step analysis under the public interest standard. The Commission must first determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.¹⁸ The first step “is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established.”¹⁹ If the petition meets this first step, the Commission must determine whether “on the basis

¹⁰ Reply at 4 (citing *WHYY, Inc.*).

¹¹ 47 U.S.C. § 309(d); 47 C.F.R. § 73.3584.

¹² 47 U.S.C. § 309(d).

¹³ *Id.*

¹⁴ See *Rainbow/PUSH Coalition*, 330 F.3d 1235 (D.C. Cir. 2005).

¹⁵ Opposition at 2 n.2.

¹⁶ Factual allegations as to why grant of a broadcast application would not serve the public interest, combined with a showing of local residence, “supply the predicate for finding injury in fact.” *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, Memorandum Opinion and Order, 82 FCC 2d 89, 98-99 (1980); *Citizens for Responsibility and Ethics in Washington*, Letter Order, 28 FCC Rcd 6312, 6316 n.45 (MB Vid. Div. 2013).

¹⁷ 47 C.F.R. §309(k)(1) (emphasis added).

¹⁸ 47 U.S.C. § 309(d)(1); *Astroline Communications Co., Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (“*Astroline*”).

¹⁹ *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

of the application, the pleadings filed, or other matters which [the Commission] may officially notice,” the petitioner has raised a substantial and material question of fact as to whether the application would serve the public interest.²⁰

Logsdon has failed to provide sufficient support for the specific allegations of fact to establish a *prima facie* showing under the first prong of this test. Specifically, the Petition lacks the requisite affidavits of a person with personal knowledge of the key facts and allegations at issue.²¹ He does not submit a transcript, tape, nor hyperlink to the on-air advertisement at issue; he does not purport to have seen it himself; and he does not submit the June 17 letter from the Party’s attorney to the Station. Even more problematically, he does not provide the proper support for the facts of Mr. Kay’s record which are in dispute – his career upon graduation from law school, and what transpired during his arrest – nor does he document how the Station knew the advertisement to be false. The Petition’s references to e-mails sent by the Station’s attorney, or unsupported statements regarding alleged facts that Logsdon purports to be somehow to his knowledge or his understanding, fall far short of the cognizable evidentiary threshold of section 309.

Although we need not reach the second prong, we also conclude that Logsdon’s allegations do not raise a substantial and material question of fact as to whether the Station has failed to serve the public interest. Section 326 of the Act and the First Amendment to the Constitution prohibit any Commission actions that would improperly interfere with the programming decisions of licensees,²² which includes not only news broadcasts but also the selection and transmission of advertisements. Because of this statutory prohibition, and because journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment’s Free Press guarantee, the Commission has very little authority to interfere with a licensee’s selection and presentation of news and editorial programming.²³

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.²⁴ We will

²⁰ *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e).

²¹ 47 U.S.C. § 309(d)(1) (“The petition shall contain specific allegations of fact sufficient to show that . . . grant of the application would be *prima facie* inconsistent with [Section 309(k)]. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.”).

²² 47 U.S.C. §326; U.S. CONST., amend. I. “The Commission is prohibited by Section 326 of the Communications Act from censoring broadcast matter, and it does not attempt to direct broadcasters in the selection or presentation of specific programming.” *Complaint by Ed Wolterman*, Letter Order, 49 FCC 2d 567, 567 (Complaints Div., BB, 1974)

²³ See, e.g., *National Broadcasting Company v. FCC*, 515 F.2d 1101, 1112-1113, 1119-1120, 1172 (1974), *vacated as moot*, *id.* at 1180, *cert. denied*, 424 U.S. 910 (1976); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 124 (1973); *Hunger in America*, 20 FCC 2d 143, 150-51 (1969). The Commission has long held that “[t]he choice of what is or is not to be covered in the presentation of broadcast news is a matter to the licensee’s good faith discretion,” and that “the Commission will not review the licensee’s news judgments.” *American Broadcasting Companies, Inc.*, 83 FCC 2d 302, 305 (1980). See also *Dr. Paul Klite*, 12 Com. Reg. (P&F) 79, 81-82 (MMB 1998), *recon. denied sub nom.*, *McGraw-Hill Broadcasting Co.*, 16 FCC Rcd 22739 (2001); *Chicago Media Action and Milwaukee Public Interest Media Coalition*, Letter Order, 22 FCC Rcd 10877 (MB Vid. Div. 2007), *pet. for recon. dismissed*, Letter Order, 23 FCC Rcd 10608 (MB Vid. Div. 2008), *second pet. for recon. dismissed*, Letter Order, 25 FCC Rcd. 17135 (MB Vid. Div. 2010).

²⁴ 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

intervene in programming matters only if a licensee abuses that discretion.²⁵ We do not find sufficient evidence on the record before us that the Station's evaluation and review of the advertisement were in bad faith or have otherwise fallen short of this standard.

ACCORDINGLY, IT IS ORDERED, That the Petition to Deny filed by Daniel Logsdon IS DENIED.

IT IS FURTHER ORDERED That the Application for Renewal of License of television station WKYT-TV, Lexington, KY, File No. BRC DT-20130401AEG is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read 'R/K' with a flourish.

Barbara Kreisman
Chief, Video Division
Media Bureau

Office of Communications of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) (subsequent history omitted)).

²⁵ *Philadelphia Station License Renewals* at 6401.