

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

In the Matter of	)	
	)	
Application of Pacifica Foundation, Inc.	)	File No.: 0000180618
For Renewal of License FM Station WBAI	)	Facility ID: 51249
New York, NY	)	

To: The Commission  
Attn: Media Bureau, Audio Division

**OPPOSITION TO PETITION TO DENY**

Pacifica Foundation, Inc. (Pacifica), by counsel and pursuant to Section 73.3584(b) of the Commission's Rules,<sup>1</sup> respectfully submits this Opposition to Petition to Deny (Opposition) responding to the Petition to Deny (Petition) filed in the above-captioned proceeding by Pacifica Safety Net (PSN) on May 2, 2022.<sup>2</sup>

**I. Introduction**

The Commission should dismiss PSN's Petition because it is procedurally flawed and substantively baseless. As an initial matter, PSN lacks standing to file the Petition. Moreover, the sweeping, conclusory, and often jumbled, allegations in the Petition have no basis whatsoever in fact. At core, PSN's Petition is nothing more than an effort to lure the

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<sup>1</sup> 47 C.F.R. § 73.3584(b).

<sup>2</sup> The Petition has been assigned LMS Pleading File No. 0000189933.

Commission into a private disagreement among Pacifica Board members about how to program WBAI(FM) (WBAI). Needless to say, the Commission should not take the bait.

Accordingly, as demonstrated below, the Commission should dismiss the Petition and grant WBAI's license renewal application.

## II. PSN Lacks Standing

Under Section 309(d) of the Communications Act of 1934, as amended (the Act),<sup>3</sup> a party has standing to file a petition to deny only if grant of an application would result in, or reasonably be likely to result in, some injury of direct tangible nature.<sup>4</sup> In the broadcast regulatory context, standing is generally obtained by a petitioner in one of three ways: (1) as a competitor in the market suffering signal interference; (2) as a competitor in the market suffering economic harm; or (3) as a resident of the station's service area or as a regular listener of the station.<sup>5</sup> And, to establish standing as a resident of the station's service area or as a regular listener, the Commission requires a petitioner to provide an affidavit or declaration that establishes such standing.<sup>6</sup>

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<sup>3</sup> 47 U.S.C. § 309(d).

<sup>4</sup> See, e.g., *Pinelands, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6058, 6063 (1992); *Telesis Corp.*, Memorandum Opinion and Order, 68 FCC 2d 696 (1978).

<sup>5</sup> See *Chapin Enterprises, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 4250 (MB 2014); *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13042 (1999) (“[W]e will accord party-in-interest status to a petitioner who demonstrates either residence in the station's service area or that the petitioner listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station”); *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1000-1006 (D.C. Cir. 1966) (“*United Church of Christ*”) (expanding standing from traditional categories of electrical interference or economic injury to station listeners).

<sup>6</sup> See *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980); see also *Infinity Broad. Corp. of California*, Memorandum Opinion and Order, 10 FCC Rcd 9504, 9504, paras. 8-10 (1995); *Tabback Broad. Co., supra*, and *Niles Broad. Co.*, Memorandum Opinion and Order, 7 FCC Rcd 5959, 5959, para. 3 (1992).

Here, by its own statements, PSN is a California-based 501(c)(3) non-profit corporation, self-described as a “media foundation of concerned listeners and donors to WBAI and to other Pacifica Foundation licensed radio stations.”<sup>7</sup> PSN is not a competitor in the market. Moreover, although PSN asserts that it has “members” who reside “within the broadcast radius of” WBAI, the Petition was filed by PSN itself and not by any of these “members.”<sup>8</sup> In fact, of the three individuals that PSN lists as members, none has submitted an affidavit or declaration with personal knowledge of the facts alleged.

### **III. This is a Private Dispute Between PSN and Pacifica**

Although Pacifica addresses below the Petition’s allegations related to WBAI’s compliance with the Commission’s underwriting, sponsorship identification, and donor list requirements, it is only in the final two pages of the Petition that PSN reveals its true motivation in filing the Petition – PSN simply does not agree with how WBAI is being programmed and managed.<sup>9</sup>

PSN represents that it is “led by current and former Pacifica Foundation board of directors, donors, and listeners . . .” and, at core, PSN’s complaints are focused on Pacifica’s corporate governance and PSN’s dissatisfaction with WBAI’s programming. However, the Commission has acknowledged time and again, that the First Amendment of the U.S. Constitution and Section 326 of the Act,<sup>10</sup> generally limit the role of the Commission in

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<sup>7</sup> Petition at 1.

<sup>8</sup> See Petition, Exhibit 1, para. 7; Petition, Exhibit 3.

<sup>9</sup> According to PSN, “[i]t is indeed sad to see that the medical quacks who now dominate WBAI find themselves working hand in hand with those wishing to diminish or disable Pacifica stations altogether. As the quacks come to dominate regular programming, and expand their on-air solicitation time, regular programming of merit is marginalized or lost.” Petition at 20.

<sup>10</sup> 47 U.S.C. § 326.

overseeing program content and that “[I]licensees have broad discretion, to choose, in good faith, the programming they believe serves the needs and interest of their communities.”<sup>11</sup>

With particular regard to noncommercial educational stations such as WBAI, the Commission has chosen to advance the public broadcasting system by leaving format decisions to the licensees “rather than determining the content of its programming.”<sup>12</sup>

Because the Petition is nothing more than a private internal squabble over how WBAI should be programmed, PSN’s allegation lie wholly outside the Commission’s jurisdiction.<sup>13</sup>

#### **IV. WBAI Does Not Accept Paid Programming or Underwriting**

The Act and the Commission’s rules require on-air sponsorship identification when a radio station transmits any matter for which money or other consideration is paid or promised to the station or its employees.<sup>14</sup> Simply put, WBAI does not air any paid or sponsored

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<sup>11</sup> Letter to Mr. Peter D. Moss, DA 07-4180, 22 FCC Rcd. 18328 (MB 2007). See also, *e.g.*, *Mr. Robert Meshanko*, Letter, 22 FCC Rcd 4809, 4810 (2007); *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993), citing *Time-Life Broadcast, Inc.*, Memorandum Opinion and Order, 33 FCC 2d 1081, 1082 (1972), and *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (subsequent history omitted).

<sup>12</sup> See *Mr. Edward W. Mudd II*, Letter, 21 FCC Rcd 11871, 11872 (2006), citing *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, Notice of Proposed Rulemaking, 87 FCC 2d 716, 732 (1981).

<sup>13</sup> The Commission has consistently held that parties should seek redress for private disputes in venues of competent jurisdiction. See *John F. Runner, Receiver (KBIF)*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976); *Decatur Telecasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 8622 (1992).

<sup>14</sup> See 47 U.S.C. § 317(a)(1); 47 C.F.R. § 73.1212(a); see also 47 C.F.R. § 73.503(d).

Section 317(a)(1) of the Act provides in part:

All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person. 47 U.S.C. § 317(a)(1).

Section 73.1212(a) of the Commission’s rules provides in part:

(a) When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce: (1) That such matter is sponsored, paid for, or furnished, either in

programming, and the Petition does not provide any properly supported allegations of fact to the contrary.<sup>15</sup> Accordingly, it is impossible for WBAI to have violated the Commission's sponsorship identification rules. Similarly, because WBAI does not carry any on-air underwriting announcements to acknowledge contributor support, it is not possible for WBAI to have violated the Commission's underwriting rules.<sup>16</sup>

## V. WBAI Pledge Drives

Although WBAI does not air any underwriting announcements, or any paid or sponsored programming, the large majority of WBAI's income does derive from listener contributions made in response to over-the-air scheduled pledge drives.<sup>17</sup> Because WBAI depends on pledge drives for most of its operating budget, the station may have more pledge programming than some other noncommercial radio stations, but as the Commission has made explicitly clear, noncommercial educational stations are permitted to raise funds for themselves, and there are no restrictions on how much time a station can spend on such activities, including announcements promoting program-related materials sold directly by the station itself.<sup>18</sup>

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whole or in part, and (2) By whom or on whose behalf such consideration was supplied. 47 C.F.R. § 73.1212(a).

<sup>15</sup> See Declarations of Pacifica Executive Director Stephanie D. Wells and WBAI Station Manager Berthold Reimers, attached hereto.

<sup>16</sup> Section 399B of the Act and sections 73.503(d) and 73.621(e) of the Commission's rules, permit station contributors to receive on-air underwriting acknowledgements but proscribe the broadcast of any announcements which promote the sale of goods and services of for-profit entities in return for consideration paid to the station. 47 U.S.C. § 399B; 47 C.F.R. § 73.503(d) & 73.621(e).

<sup>17</sup> WBAI also receives a nominal amount of general grant money, as well as funding from Pacifica's national budget when necessary to cover any budget shortfalls. See Declarations of Pacifica Executive Director Stephanie D. Wells and WBAI Station Manager Berthold Reimers, attached hereto.

<sup>18</sup> See Commission Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations, 90 FCC 2d 895, 907 (1982). The Commission has also confirmed that "regular programming . . . does not encompass those fundraising activities that suspend or alter [ ] normal programming fare. Thus, during periods in which such fundraising activities are being conducted, the restriction that acknowledgements shall not be scheduled so as to interrupt regular programming would neither be applicable nor appropriate, and the public broadcasters are

All WBAI pledge drive programming is produced and controlled by the station itself.<sup>19</sup> Pledge drive on-air talent are either paid a flat appearance fee (just like any other paid on-air talent) or receive no compensation at all.<sup>20</sup> For any premiums provided to donors in association with their pledged donations, WBAI acquires the premiums in various ways. Some premiums are donated at no cost to WBAI; some premiums are purchased in bulk at wholesale rates from the premium producers; some premiums are purchased at cost from the premium producers;<sup>21</sup> and some premiums are even purchased as economically as possible from Amazon and other retail outlets.<sup>22</sup> In all cases, though, the pledge amount associated with a given premium is set at an amount that exceeds WBAI's cost associated with that premium, and is often set at a multiple of five to ten times that cost.<sup>23</sup> Further, WBAI does not maintain any inventory of premiums – all premiums are purchased and paid for by WBAI only after the listener-pledged funds associated with that premium have been received by WBAI.<sup>24</sup>

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free to broadcast acknowledgements as often and for as long as they choose, so long as the content of the acknowledgements is consistent with the governing legislative and regulatory rules.” *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 97 FCC 2d 255, 264 (1984). See also, Public Notice, *In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 7 FCC Rcd 827, 828 (1986).

<sup>19</sup> See Declaration of WBAI Station Manager Berthold Reimers, attached hereto.

<sup>20</sup> *Id.*

<sup>21</sup> Gary Null has represented to WBAI's General Manager that all of Mr. Null's products and services used as WBAI premiums are sold to WBAI at cost.

<sup>22</sup> See Declaration of WBAI Station Manager Berthold Reimers, attached hereto.

<sup>23</sup> *Id.*

<sup>24</sup> All donations associated with listener pledges are made directly from a donor to WBAI, with one pre-pandemic exception. That exception was for a pledge drive offering an in-person retreat with on-air talent Gary Null as a premium. Because of the high cost associated with this premium, and the unique cash flow issues associated with the retreat, the pledge amounts were sent directly to Gary Null rather than to WBAI. Mr. Null would then keep the amount associated with the cost of the retreat and would send the remaining amount to WBAI. WBAI has not offered this premium in at least two years, and does not anticipate offering it again anytime in the future.

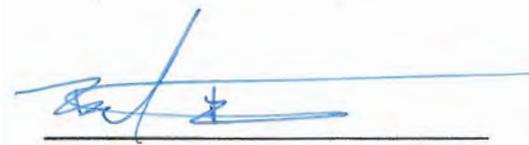
## VI. FCC Donor List

The Commission's rules require noncommercial radio stations to maintain an FCC "donor list" in their online public file, but only if a station has donors who support specific programs.<sup>25</sup> WBAI does not have any donors who provide dedicated funding to support specific programs and, accordingly, WBAI does not currently maintain an FCC donor list.

## VII. Conclusion

For the reasons presented above, the Commission should summarily dismiss the Petition because it does not provide a single supported allegation of fact that, if true, would establish a substantial and material question of fact that grant of the Application would be *prima facie* inconsistent with Section 309(k) of the Act.<sup>26</sup>

Respectfully submitted,



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*Counsel for* Pacifica Foundation, Inc.

June 1, 2022

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<sup>25</sup> 47 C.F.R. § 73.3527(e)(9). The FCC list of donors supporting specific programs must be retained for two years from the date of broadcast of the specific program supported.

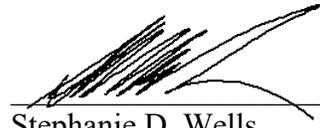
<sup>26</sup> Section 309(k) governs the Commission's evaluation of license renewal applications. Section 309(k)(1) provides that the Commission shall grant a renewal application if the Commission finds that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse. 47 U.S.C. § 309(k)(1).

**Exhibit A**  
**Declaration of Stephanie D. Wells**  
**Executive Director, Pacifica Foundation**

## DECLARATION OF STEPHANIE D. WELLS

I, Stephanie D. Wells, declare under penalty of perjury that the following statements are true and correct.

1. I am the Executive Director of Pacifica Foundation, Inc. (Pacifica), licensee of WBAI(FM), New York, NY (WBAI).
2. WBAI does not air (a) any paid or sponsored programming or (b) any underwriting announcements.
3. A significant majority of WBAI's income derives from listener contributions made in response to over-the-air scheduled pledge drives.
4. I have read the foregoing Opposition to Petition to Deny, and to the best of my knowledge, information and belief, relying on my own personal knowledge and the personal knowledge of other Pacifica employees, the information contained therein with respect to WBAI is true and accurate.



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Stephanie D. Wells

June 1, 2022

**Exhibit B**  
**Declaration of Berthold Reimers**  
**General Manager, WBAI(FM)**

## DECLARATION OF BERTHOLD REIMERS

I, Berthold Reimers, declare under penalty of perjury that the following statements are true and correct.

1. I am the General Manager of WBAI(FM), New York, NY (WBAI).
2. WBAI does not air (a) any paid or sponsored programming or (b) any underwriting announcements.
3. A significant majority of WBAI's income derives from listener contributions made in response to over-the-air scheduled pledge drives.
4. All WBAI pledge drive programming is produced and controlled by the station itself. Pledge drive on-air talent are either paid a flat appearance fee or receive no compensation at all.
5. WBAI acquires the premiums associated with pledge drive programming in several different ways – some premiums are donated at no cost to WBAI; some are purchased in bulk at either wholesale rates or at cost; and some are purchased as economically as possible from retail outlets.
6. The pledge amount associated with a given premium is set at an amount that exceeds WBAI's cost for that premium, often at a multiple of five to ten times the cost.
7. WBAI does not maintain any inventory of premiums. WBAI acquires premiums only after the listener-pledged funds associated with that premium have been received by WBAI.
8. WBAI does not have any donors who provide funding to support specific programs.
9. I have read the foregoing Opposition to Petition to Deny, and to the best of my knowledge, information and belief, the information contained therein with respect to WBAI is true and accurate.



Berthold Reimers

June 1, 2022

## Certificate of Service

I, Cindy Lloyd, hereby certify that I have, this 1<sup>st</sup> day of June, 2022, cause a copy of the foregoing "Opposition to Petition to Deny" to be sent via electronic mail and/or U.S. Mail, as indicated below, to:

### Service by Email

Albert Shuldiner, Chief, [Albert.Shuldiner@fcc.gov](mailto:Albert.Shuldiner@fcc.gov)  
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Cindy Lloyd