



Federal Communications Commission
Washington, D.C. 20554

February 5, 2014

In Reply Refer to:
1800B3-RSS

Larry Ence
361 W. 1000 N.
Bountiful, UT 84010

Kenneth E. Satten, Esq.
Wilkinson Barker Knauer, LLP
2300 N St. NW
Suite 700
Washington DC 20037

In re: **Brigham Young University**
KBYU-FM, Provo, Utah
Facility ID No. 6825
File No. BRED-20130530AHX

**Application for Renewal
Radio Station License
Informal Objection**

Dear Messrs. Ence and Satten:

This letter refers to: (1) the above-captioned application of Brigham Young University ("BYU") to renew its license ("Renewal Application") for KBYU-FM, Provo, Utah ("KBYU" or "Station"), and (2) the August 28, 2013, letter, styled as an informal objection ("Objection"),¹ from Mr. Larry Ence ("Ence") opposing the Renewal Application.² For the reasons set forth below, we deny the Objection and grant the Renewal Application.

Background. BYU timely filed the Renewal Application on May 30, 2013.³ On September 27, 2013, the Commission granted BYU's Renewal Application, and on October 23, 2013, rescinded such grant upon delayed receipt of the Objection.⁴

¹ See 47 C.F.R. § 73.3587.

² BYU did not file an opposition to the Objection.

³ Renewal applications for stations in Utah were to be filed by June 3, 2013, and licenses expired on October 1, 2013.

⁴ We note that Ence timely filed the Objection before we granted the BYU Renewal Application. Due to a typographical error in the Objection (incorrectly noting Station KBYU's Facility ID as "174114" when in fact it is

Ence's sole complaint is that KBYU's classical music programming does not meet the musical needs of its listeners, and he advances two discernible reasons as to why he believes this to be so. Ence first contends that KBYU disproportionately plays certain classical music subgenres despite evidence that the majority of its audience prefers other subgenres of classical music.⁵ Second, Ence argues that KBYU "never, never" plays "military" or "civilian" band music despite evidence that this music is quite popular in KBYU's broadcast area.⁶ Thus, Ence submits, KBYU fails to achieve its stated objective "to better serve the majority of their listeners."⁷

Discussion. An informal objection must, pursuant to Section 309(d) of the Communications Act of 1934, as amended (the "Act"), provide properly supported allegations 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,⁸ which governs our evaluation of an application for license renewal. Specifically, Section 309(k)(1) provides that we are to grant the renewal application if, upon consideration of the application and pleadings, we find 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 that, taken together, constitute a pattern of abuse.⁹ If, however, the licensee fails to meet that standard, the Commission may deny the application, after notice and opportunity for a hearing under Section 309(d) of the Act, or grant the application "on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted."¹⁰

"6825") in conjunction with delay associated with the Federal Government shutdown, the Objection was not accepted by Media Bureau staff for processing prior to granting the Renewal Application. However, as the Objection was duly filed prior to the Renewal Application grant, we rescinded our grant of the Renewal Application to address the issues raised in the Objection. See *Broadcast Applications*, Public Notice, Report No. 28103 (MB October 28, 2013).

⁵ Ence notes that KBYU devotes "nearly half" of its classical music programming to "[b]aroque," "[c]lassic," and "[c]hamber music" genres notwithstanding the results of KBYU's surveys indicating that the majority of its listeners prefer "[r]omantic, and [m]odern [p]eriods of [c]lassical [m]usic." See Objection at 1.

⁶ *Id.* (noting that if a "military band plays in the area of KBYU's broadcasting, the auditorium is always packed").

⁷ *Id.* (internal quotations omitted).

⁸ 47 U.S.C. § 309(k). See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh'g denied* (D.C. Cir. Sept. 10, 1993).

⁹ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described in the text by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

¹⁰ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

Content-based complaints concern matters over which the Commission has only limited authority to review.¹¹ The Commission's role in overseeing program content is limited by the First Amendment to the United States Constitution and Section 326 of the Act, which prohibit the Commission from interfering with broadcasters' freedom of expression and from censoring program material.¹² While the Commission will regulate broadcast content where federal statutes direct it to do so,¹³ we "will not take adverse action on a license renewal application based upon the subjective determination of a listener or group of listeners as to what constitutes appropriate programming," such as is the case here.¹⁴ Rather, a licensee has broad discretion to choose, in good faith, the programming it believes serves the needs and interests of its audience community.¹⁵ We will intervene in programming matters only if a licensee abuses that discretion.¹⁶

Ultimately, Ence's complaints concerning KBYU's classical music programming amount to a difference of opinion regarding the style of classical music programming better-suited to KBYU's audience community. Such a difference of opinion is not actionable by the Commission, and does not constitute grounds for denial of a licensee's renewal application. Because of the broad programming discretion allotted KBYU, its decision to broadcast baroque, classic, or chamber music subgenres of classical music, rather than romantic and modern period subgenres, or military and civilian band music is well within its purview. Absent a showing that KBYU has abused its broad discretion, we will not substitute our judgment for that of KBYU.

Thus, regardless of the allegations' veracity, the Objection does not warrant our intervention. Accordingly, we do not find that Ence's allegations raise a substantial and material question of fact that grant of the Renewal Application would be *prima facie* inconsistent with the Act.

We have evaluated BYU's Renewal Application pursuant to Section 309(k) of the Act, and Sections 0.61 and 0.283 of the Rules.¹⁷ Particularly given BYU's noncommercial, educational nature and mission, we cannot conclude from this record that BYU has violated the Act or the Rules. We have found

¹¹ See *Ms. Lora Leland et al.*, Letter, 23 FCC Rcd 11008, 11010 (2008) (noting that the Commission regulates broadcast content only in very limited circumstances, such as where federal statutes direct it to do so, listing the enforcement of the statutory prohibition on broadcast of obscene, indecent and profane material as examples).

¹² U.S. Const., Amend I; 47 U.S.C. § 326.

¹³ See, e.g., 18 U.S.C. § 1464.

¹⁴ See *supra* note 11 (citing *WGBH Educational Foundation*, Memorandum Opinion and Order, 69 FCC 2d 1250, 1251 (1978)). In fact, the Commission has specifically noted that programming not targeted at a local community may nonetheless serve community needs and interests. See *KGAN Licensee, LLC*, 25 FCC Rcd 2549, 2557 (2010).

¹⁵ 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 *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (subsequent history omitted)).

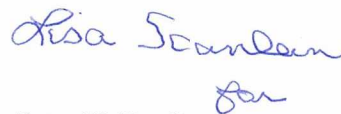
¹⁶ *Philadelphia Station License Renewals*, 8 FCC Rcd at 6401.

¹⁷ 47 U.S.C. § 309(k); 47 C.F.R. §§ 0.61, 0.283.

no violations which, taken together constitute a pattern of abuse, and have not found that BYU has failed to serve the needs of its community or the public interest generally.

Conclusion. In sum, we find no evidence of rule violations by BYU that would warrant conditioning or denying its Renewal Application for Station KBYU. Moreover, as previously determined, we find that Station KBYU has served the public interest, convenience, and necessity during the subject license term. Accordingly, in light of the above discussion, and pursuant to Section 309(k) of the Communications Act of 1934, as amended, and Sections 0.61 and 0.283 of the Commission's Rules,¹⁸ the Objection filed by Mr. Larry Ence IS DENIED. IT IS ORDERED that, pursuant to Section 309(k) of the Communications Act of 1934, as amended, the license renewal application of Brigham Young University, for Station KBYU-FM, Provo, Utah (File No. BRED - 20130530AHX) IS GRANTED.

Sincerely,

A handwritten signature in blue ink that reads "Peter H. Doyle" with a stylized flourish at the end.

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁸ *Id.*