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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application of	)	
	)	
Application for Renewal of License WFOR-TV, Miami, Florida	)	BRCT-20041001AJQ
	)	
	)	
Application for Renewal of License WTVJ(TV), Miami, Florida	)	BRCT-20041001ABM

OPPOSITION OF NBC TELEMUNDO LICENSE CO.
TO APPLICATION FOR REVIEW REGARDING
RENEWAL APPLICATION OF WTVJ(TV)

The Application for Review filed by the United Church of Christ ("UCC" or "Petitioner") offers no basis to reverse the Media Bureau's decision that Television Broadcast Station WTVJ ("WTVJ" or the "Station") and its licensee, NBC Telemundo License Co. ("NBC Telemundo"), did not violate licensee discretion by not airing a single paid advertisement that the Petitioner concedes it never even offered to the Station. In the Application for Review, the Petitioner repeats its argument that the Station's conduct during its past license term merits review because the NBC Network (the "Network" or "NBC Network"), a television broadcast network that is commonly controlled with NBC Telemundo, declined to accept one of multiple advertisements submitted to the Network by the Petitioner. As noted in the underlying proceeding, the Station was targeted not because of any shortcomings in the Station's service to its community of license, which was substantial and exemplary, but because the Station happened to have a renewal application pending when the NBC Network rejected the paid advertisement pursuant to a long-standing Network policy.

Contrary to UCC's claims, the Media Bureau correctly rejected the UCC petition, underscoring that:

i) the claim was suitable for Bureau adjudication;

ii) the Petitioner's dispute was not with respect to the Station but with one of the Station's programming sources; and

iii) the Bureau reasonably interpreted Section 309(k) of the Communications Act, which, by its plain terms, limits review of a station renewal application to matters "with respect to that station."

As a further reason to uphold the Bureau's decision, the rejection of any lawful, non-candidate advertisement is a matter entirely within the editorial discretion of a broadcast station or its network, and does not give rise to a *prima facie* claim or raise a substantial and material question of fact concerning the station's service to the public. Accordingly, the Bureau's decision should be upheld and the Application for Review denied.

BACKGROUND

In February 2004 and again in November 2004, the UCC, through its advertising agency, approached the NBC Network with an advertisement (the "Night Club") that portrayed other churches and religions as discriminatory in their refusal to accept people who are African-American, Hispanic, disabled, or gay. [1] Because the Night Club was contrary to the Network's policy regarding paid advertisements relating to issues of public controversy -- by suggesting that churches other than the UCC are not open to people of diverse races and backgrounds -- the Network refused to air the ad. [2] Also in November 2004, the Network accepted a second UCC advertisement that did not implicate the Network's policy.

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1 *See* Opposition of NBC Telemundo License Co. to Petition to Deny Renewal at 2 (submitted Jan. 10, 2005) ("Opposition" or "NBC Telemundo Opposition").

2 Although not material to this proceeding regarding the Station's renewal application, the Network's policy continues to be applied uniformly to non-political advertisers seeking to buy time on the Network, which, in part because the Network's programming is transmitted to more than 200 affiliates nationwide, has considerations in determining the acceptability of an advertisement beyond those of an individual affiliate. In this instance, the Network's policy is rooted in the concern that dealing with issues of public controversy through paid Network commercials could allow only the wealthiest organizations to dominate the public debate on such issues, resulting in imbalanced and unfair presentations of viewpoints. In this case, the core message of the rejected ad – that churches other than the UCC do not welcome African-Americans, Latinos, gays, and people in wheelchairs – presented the kind of controversial public issue that, in the Network's view, should not be addressed through paid network commercials. In making this determination, the Network exercised precisely the type of responsible editorial judgment that the Commission expects of independent media entities.

On December 9, 2004, UCC filed the Petition to Deny against the Station's renewal application. [3] As UCC has conceded, the Night Club ad never was offered to the Station, even though UCC now acknowledges that it had contracted with other local NBC Network affiliates to air the ad. [4] NBC Telemundo opposed the Petition, noting, among other defects with the pleading, that: [5]

- The dispute was not with respect to the Station, but with the Network, which, while commonly controlled with NBC Telemundo, is a separate business and does not have identical ownership with NBC Telemundo.
- Stations licensed to NBC Telemundo have complete discretion to accept paid controversial issue advertising, subject to such stations' own standards, even if that same advertising might not be acceptable to the NBC Network.
- Even if UCC had approached the Station with the ad *and* the Station refused to accept the ad, any complaint based on the rejection of a single paid advertisement is not sufficient to establish a *prima facie* claim or raise a substantial question as to the Station's service to the public because: i) there is no legal requirement that a broadcast station must accept particular advertising (other than from certain qualified political candidates) and ii) throughout the license term, the Station has provided extensive local news and other programming addressing issues of local concern.
- The remedy urged by the Petitioner [6] – that stations (or networks) should be required to accept all issue advertising – violated the First Amendment as well as established court and Commission precedent (including a decisive ruling from the Supreme Court).

In August 2007, the Media Bureau, by letter from the Video Division, denied the Petition without needing to reach more than the first two points noted above. [7] The Petitioner has continued to press this matter, now claiming that the Bureau's rejection was either novel, arbitrary or contrary to the Communications Act.

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3 United Church of Christ Petition to Deny Renewal, File No. BRCT-20041001ABM (Dec. 9, 2004) ("Petition").

4 *See* Petition at 3; Application for Review at 2 (noting that five NBC affiliates had aired the ad locally).

5 *See* Opposition at 2-14.

6 *See* Petition at 7-8.

7 Letter from Barbara Kreisman, Chief, Video Division, to Andrew J. Schwartzman, Esq., Media Access Project, and Margaret Tobey, Morrison & Foerster, LLP, DA 07-3533 (rel. Aug. 7, 2007) ("Denial Letter").

ANALYSIS

I. THE MEDIA BUREAU WAS CORRECT TO DISMISS THE UCC'S PETITION FOR FAILING TO RAISE *ANY* QUESTION "WITH RESPECT TO" THE STATION, AS REQUIRED BY THE COMMUNICATIONS ACT

Section 309(k)(1) of the Communications Act plainly sets forth the standard for renewal: [8]

> If *the licensee of a broadcast station* submits an application to the Commission for renewal of *such license*, the Commission shall grant the application if it finds, *with respect to that station*, during that preceding term of *its* license – (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.

The Petitioner has not alleged any violation or failure on the part of the Station to serve the public interest. Assuming, purely for purposes of argument, that a station's rejection of a single paid advertisement could be deemed to require further Commission inquiry, the Petitioner has conceded that the Station never was presented with the issue advertisement and further has acknowledged that it offered that advertisement to other local NBC affiliates. At most, the Petitioner has alleged that the television network with which the Station is commonly controlled refused to air controversial issue advertising on the network.

As the Media Bureau correctly concluded, this single allegation does not give rise to a substantial question of material fact as to whether the Station served the public interest in its preceding license term. As the Bureau explained: "Under the plain terms of section 309(k), the Commission cannot deny a license renewal application based on violations that occurred at other stations licensed to the same licensee because the relevant findings must be made 'with respect to that station.'" [9] The Bureau went on to explain how the plain language of the Communications Act must end the current dispute: "'Congress . . . has

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[8] 47 U.S.C. § 309(k)(1) (emphasis added).

[9] *See* Denial Letter at 2.

expressly limited the scope of the license renewal inquiry to matters occurring at the particular station for which license renewal is sought." [10]

The Bureau's reading of the plain language of the statute is not novel, but correct and consistent with past Bureau precedent and other Commission pronouncements. [11] In struggling to create ambiguity despite the clarity of the statutory language and past Bureau actions, the Petitioner contends that the statutory clause enables the Commission to consider the conduct of any company affiliated with the station up for renewal *except for* the conduct of other commonly owned stations. In other words, the Petitioner claims that the statute precludes consideration of actions of other commonly owned stations that at least arguably are themselves subject to direct Commission oversight, but expressly authorizes the Commission to take into account actions by affiliated companies, even those that are not generally deemed within the Commission's direct jurisdiction.

The Application for Review does not cite any authority for this unsupportable distortion of the statute, but merely cites precedent addressing whether the Commission may consider network programming that actually aired on a station as part of that station's renewal process. Such precedent is not relevant to the current matter for the simple reason that the Station *never was presented with the advertisement in question, either by the Petitioner or the Network*. The Petitioner conceded that it never took the ad directly to the Station – even though UCC admits to taking the ad to other local NBC affiliates –

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[10] *See* Denial Letter at 2 & n.10 (citing *Sagittarius Broadcasting Corp.*, 18 FCC Rcd 22551, 22555 (2003)). Although *Sagittarius* rejected a claim that common ownership of a station and a second station allowed a petitioner to bring its claim against the second station as part of a discussion of standing, Petitioner's attempt to narrow the reading of that case to apply only to issues of standing misses the point. The Bureau cited *Sagittarius* as an application of the plain meaning of Section 309(k): that renewal applications turn on the individual station's record of service during its preceding term, not the actions of some related or affiliated media entity – in that case, a commonly owned, licensed radio station in a different state.

[11] *See* Letter from Peter Doyle, Chief, Audio Division, to Counsel regarding Application for Renewal of WGIT(AM), Canovanas, Puerto Rico, 21 FCC Rcd 2200 at *11-12 (2006) (citing renewal form and instructions in rejecting claims raised against station undergoing renewal based on dispute with commonly owned station).

and does not allege that the Network consulted with the Station prior to rejecting the advertisement. Accordingly, unlike programming that the Network actually transmits to its affiliates, and which the Station, with other affiliates, subsequently receives and chooses to air, the Station in this case never was involved with the rejected advertisement at all. [12]

The Petitioner also fails in its further attempt to minimize the significance of its refusal to offer the ad to the Station by claiming that the Network's refusal implies that the Station also would have refused the ad. NBC Telemundo stated in its Opposition that the Network and the Station have different policies with respect to controversial issue advertising – a statement that remains accurate today. In fact, stations owned by NBC Telemundo have aired controversial issue advertising that was not accepted by the Network, but may have been addressed by a station's own local news efforts. Accordingly, Petitioner's speculation that any approach to the Station would have been futile must be accorded no weight.

II. EVEN IF THE STATION HAD BEEN PRESENTED WITH AND DENIED UCC'S PAID ADVERTISEMENT, DENIAL OF A SINGLE ADVERTISEMENT WOULD NOT GIVE RISE TO ANY SUBSTANTIAL QUESTION AS TO THE STATION'S SERVICE TO THE PUBLIC

The UCC's entire claim is based on the following unsupported, and unsupportable, assertion: that "WTVJ improperly failed to recognize that the UCC had a limited right of access for the purchase of time."[13] The UCC acknowledges that this assertion is not based on the Fairness Doctrine, which has been

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[12] Indeed, Petitioner's own complaint with the Bureau's straightforward Denial Letter ignores this key difference when it claims that stations should be accountable for network "programming decisions as implemented by network owned and operated stations." *See* UCC Application for Review at 4. In this case, the Station – just like non-commonly owned affiliates of the Network -- did not "implement" or participate in any decision by the Network not to transmit the ad to the Network's affiliates. To contend otherwise is to argue that a station is responsible not just for what it airs, but for what its various programming sources – networks, syndicators, local providers – decide not to air.

[13] Petition at 4.

eliminated, [14] or any other express rule or policy currently in force, but rather on "the policies inherent in the public interest standard of the Communications Act."[15]

The UCC's argument ignores that, in adopting the Radio Act of 1927 (the predecessor to the Communications Act of 1934), "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."[16] The drafters rejected a common carrier model for broadcasters in favor of a system of private broadcasting in which broadcast licensees enjoy "the widest journalistic freedom consistent with [their] public obligations." [17] This principle was deemed sufficiently important to require an express disclaimer in what became the Communications Act of 1934 that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."[18]

The Commission and the courts consistently have upheld the principle that private individuals, with the very limited exception of qualified candidates for federal office, do not have the right to demand access

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14 More than two decades ago, the FCC released an exhaustive "Fairness Report" declaring the Fairness Doctrine obsolete, "no longer [in] ... the public interest," and of questionable constitutional validity. *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 246 (1985) ("Fairness Report"). The report concluded that new media technologies and outlets ensured dissemination of diverse viewpoints without the need for federal regulation, that the Fairness Doctrine chilled speech on controversial subjects, and that the doctrine interfered too greatly with journalistic freedom. *See id.* at 147. Less than a year later, the D.C. Circuit held that the Fairness Doctrine derived from the FCC's mandate to serve the public interest, subject to changing agency interpretation, and was not compelled by statute. *See Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 517-18 (D.C. Cir. 1986), *cert. denied* 482 U.S. 918 (1987). The following year, the Commission announced that it would no longer enforce the Fairness Doctrine. *Syracuse Peace Council*, 2 FCC Rcd 5043, 5043 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988).

15 Petition at 4-5.

16 *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 105 (1973) ("*CBS v. DNC*").

17 *Id.* at 109-110,118-119.

18 47 U.S.C. § 153(10); *see also CBS v. DNC*, 412 U.S. at 109; *FCC v. Sanders Brothers*, 309 U.S. 470, 474 (1940) ("the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such").

to broadcast time. [19] Since the Supreme Court rejected the claims of a private individual seeking airtime to address controversial issues in *CBS v. DNC*, the Commission repeatedly has rejected similar claims. For example, in *J. Curtis Herge*, the Commission reiterated that Congress had declined to treat broadcasters as common carriers: [20]

> [W]ith certain statutory exceptions such as "reasonable access" for federal candidates and "equal time" for political candidates generally, each broadcaster is free to carry or reject any program it chooses. Within this framework, it is well established that a broadcaster is not a common carrier with the obligation to afford a right of access for all persons desiring to speak out on public issues. In addition to the statutory mandate [in Section 3(h)], the Commission has consistently adhered to the policy that private individuals do not have a right to demand access to broadcast time. Moreover, the Supreme Court has affirmed the Commission's determinations that the "public interest" standard of the Communications Act, which incorporates First Amendment principles, does not require broadcasters to accept every announcement offered for broadcast.

Following the FCC's decision to eliminate the Fairness Doctrine, at least one court has reiterated that the Supreme Court's decision in *CBS v. DNC* is controlling on the question whether individuals or groups can demand a right of access to the public airwaves. In *Amiri v. WUSA-TV Channel Nine*, [21] the U.S. District Court for the District of Columbia ruled that the plaintiff, who sued WUSA-TV for refusing to air stories he deemed newsworthy concerning alleged misconduct by federal district court judges, did not have a right of access to broadcast time on WUSA-TV. [22] In denying the plaintiff's motion for reconsideration, the court emphasized that the plaintiff had failed to respond to WUSA-TV's contention, "which this Court

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[19] *See CBS v. DNC*, 412 U.S. at 109; *Johnson v. FCC*, 829 F.2d 157, 161-62 (D.C.Cir. 1987) (ruling that candidates for political office do not have an absolute right to participate in televised debates); *Rokus v. American Broadcasting Company, Inc.*, 616 F.Supp. 110, 113-14 (S.D.N.Y. 1984) ("Neither the Act nor the First Amendment requires ABC to sell commercial time to persons wishing to discuss controversial issues"); *J. Curtis Herge*, 88 F.C.C.2d 626 (B'cast Bur. 1981).

[20] *Id.* at 627 (citations omitted).

[21] 751 F. Supp. 211 (U.S.D.C. 1990).

[22] *Id.* at 212 (citations omitted).

found to be indisputable, that as a matter of law no individual may compel a television station to broadcast that person's views, no matter how true and important they may be."[23]

The Supreme Court's ruling in *CBS v. DNC* underscored that implementing a mandated right of access to the public airwaves would create a "problem of critical importance to broadcast regulation and the First Amendment – the risk of an enlargement of Government control over the content of broadcast discussions of public issues."[24] The Court recognized that the type of government-mandated and supervised right of access advocated by the respondents – just like the right of access demanded by the UCC in this case – would be inimical to the constitutionally prescribed limits on the government's oversight role with respect to broadcast content: [25]

> The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements. To sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result.

A claim that a station should risk being designated for hearing because it decides to reject a single advertisement is contrary to each of these long-settled Constitutional, statutory and practical considerations. That a station should be subject to such a claim when the station did not even have a chance to review the advertisement – or that a ruling rejecting such a claim is novel and contrary to court and Commission precedent – is ridiculous on its face and should be flatly denied.

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23 *Id.*

24 *CBS v. DNC* at 126.

25 *Id.* at 127 (emphasis added) (citation omitted).

CONCLUSION

For all the foregoing reasons, the UCC's Application for Review should be summarily denied and the Station's renewal application granted.

Respectfully submitted,

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Dated: September 21, 2007

CERTIFICATE OF SERVICE

I, Martha Shiles, do hereby certify that a copy of the foregoing "Opposition of NBC Telemundo License Co. to Application for Review" was served by U.S. mail, postage prepaid on this 21st day of September, 2007, on the following:

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