



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

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In re: Capstar TX LLC

WISN(AM), Milwaukee, WI
Facility ID No. 65695
File No. BR-20120801AQD

Petition to Deny

Dear Sir and Madame:

We have before us the application (“Application”) of Capstar TX LLC (“Capstar”) for renewal of its license for WISN(AM), Milwaukee, Wisconsin (“Station”). We also have before us a Petition to Deny (“Petition”) filed by Media Action Center (“MAC”).¹ In addition, we have before us a political programming complaint (“Complaint”) filed by Sue Wilson on behalf of several individuals (“Wilson”). MAC alleges in its Petition and Wilson alleges in the Complaint that Capstar refused to provide air time on the Station to supporters of Tom Barrett, the Democratic candidate for Governor of Wisconsin, so that they could respond to statements aired on the Station in support of Scott Walker, the Republican candidate for that office.² MAC and Wilson argue that this refusal violated both the Zapple Doctrine and the First Amendment.³ MAC also asserts that Capstar lacks the character qualifications necessary to be a

¹ Capstar filed an Opposition to Petition to Deny on November 26, 2012, and MAC filed a Response to Opposition to Petition to Deny on December 19, 2012.

² Tom Barrett ran against Scott Walker in a recall election held on June 5, 2012. It is the run up to this election on which MAC focuses in the Petition.

³ Petition at 7-16. The Zapple Doctrine was adopted by the Commission in 1970 in response to a letter from Nicholas Zapple, then Communications Counsel for the Committee on Commerce, United States Senate, “requesting an interpretative ruling on two questions involving the applicability of the fairness doctrine to situations where supporters of a political candidate purchase broadcast time.” *In Re Request by Nicholas Zapple, Communications Counsel, Committee on Commerce For Interpretative Ruling Concerning Section 315 Fairness Doctrine*, 23 FCC 2d 707, 707 (1970). The Commission ruled that the fairness doctrine was “plainly applicable” in a situation in which a station provides time to a spokesperson for, or a supporter of, one candidate to broadcast a discussion of the

Commission licensee.⁴ For the reasons discussed below, we deny the Petition and the Complaint and grant the Application.

A petition to deny a renewal application must, pursuant to Section 309(d) of the Communications Act of 1934, as amended (the "Act"),⁵ 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,⁶ which governs our evaluation of an application for license renewal. Specifically, Section 309(k)(1) provides that we are to grant a 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.⁷ 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."⁸

While MAC purports to make Zapple Doctrine (and First Amendment) claims, we find that its real complaints relate to the Station's programming choices.⁹ It is well established, however, that the Commission cannot exercise any power of censorship over broadcast stations with respect to content-based programming decisions.¹⁰ A licensee has broad discretion – based on its right to free speech – to choose the programming that it believes serves the needs and interests of the members of its audience.¹¹

candidates or campaign issues in a particular race, and that the fairness doctrine would require that the station provide comparable time upon request to a spokesperson for or supporter of the candidate's opponent. This requirement became known as the Zapple Doctrine.

⁴ Petition at 16.

⁵ 47 U.S.C. § 309(d).

⁶ *Id.*, § 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).

⁷ 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).

⁸ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

⁹ See, e.g., Petition at 15.

¹⁰ U.S. Const. amend. 1; 47 U.S.C. § 326 ("Nothing in [the] Act shall be understood or construed to give the Commission the power of censorship over radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated . . . by the Commission which shall interfere with the right of free speech by means of radio communication").

¹¹ 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

We will intervene in programming matters only if a licensee abuses that discretion or where federal statutes direct us to do so.¹² After full review, we have determined that further Commission action is not warranted here. MAC has not shown that the licensee committed violations of the Act, the Commission's rules, or otherwise abused its discretion in determining the programming it believes serves the needs of its audience.¹³

In any event, we note that we have no basis to enforce the Zapple Doctrine. The doctrine was based on an interpretation of the fairness doctrine, which the Commission abrogated in *Syracuse Peace Council* in 1987 after concluding that it no longer served the public interest, was not statutorily mandated, and was inconsistent with First Amendment values.¹⁴ In 1989, the D.C. Circuit affirmed the Commission's conclusion that the fairness doctrine no longer served the public interest, without reaching the constitutional question.¹⁵ In August 2011, the Media Bureau and Office of Managing Director characterized the fairness doctrine as "defunct" and deleted rules referencing the fairness doctrine as "obsolete" after finding them to be "without current legal effect."¹⁶ Given the fact that the Zapple Doctrine was based on an interpretation of the fairness doctrine, which has no current legal effect, we conclude that the Zapple Doctrine similarly has no current legal effect.¹⁷

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

¹² *Philadelphia Station License Renewals*, 8 FCC Rcd at 6401 (abuse of discretion occurs if a licensee is unreasonable or discriminatory in its selection of issues that it believes are of concern to the local community or if it offers such nominal levels of issue-responsive programming so as to as effectively defaulted on its obligation). The Commission does, however, enforce the statutory prohibition on the broadcast of obscene, indecent and profane material. See 18 U.S.C. § 1464

¹³ See, e.g., *WMAL(AM), Washington, DC*, Letter, 28 FCC Rcd 14907, 14908-09 (MB 2013) (denying informal objection that argued station's programming had an "incessant bias"); *KFBK(AM), Sacramento and KSTE(AM), Rancho Cordova, California*, Letter, 22 FCC Rcd 4804, 4805 (MB 2007) (informal objections against license renewals arguing that the stations aired "heavily-biased . . . programming amount[ing] to the use of the airwaves as a relentless political pulpit, presenting only one-sided, predictable opinion on most issues, and even blatantly endorsing one political party" denied as outside the scope of Commission authority); *KUYI(FM), Hotevilla, Arizona*, Letter, 22 FCC Rcd 17305, 17308 (MB 2007) (denying programming objections that the station broadcasted "biased political public service programming"); *WYLL(AM), Chicago, Illinois*, Letter, 22 FCC Rcd 5579, 5580 (MB 2007) (denying an informal objection based on perceived political bias due to limits on Commission authority and objector's failure to provide any specific examples of objectionable programming).

¹⁴ See *Syracuse Peace Council*, Memorandum Opinion and Order, 2 FCC Rcd 5043 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988).

¹⁵ *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

¹⁶ *Amendment of Parts 1, 73, and 76 of the Commission's Rules*, Order, 26 FCC Rcd 11422, 11423 (2011).

¹⁷ We acknowledge that the Commission's decision in *Syracuse* only ruled on the application of the fairness doctrine with respect to the facts before it and did not specifically address the Zapple Doctrine or certain other applications of the fairness doctrine. However, all other applications of the fairness doctrine, including its application to ballot propositions and the personal attack and political editorial rules, have subsequently been found unenforceable or ordered repealed by the U. S. Court of Appeals for the D.C. Circuit given their reliance on the fairness doctrine. See *Complaint of the Arkansas AFL-CIO and the Committee Against Amendment 2 v. Television Station KARK-TV, Little Rock, Arkansas*, 7 FCC Rcd 541 (1992); *Radio-Television News Directors Assoc. v. FCC*, 229 F.3d 269 (D.C. Cir. 2000). We note that, unlike the personal attack and political editorial rules, the Zapple Doctrine was never codified as a rule. Thus, rulemaking proceedings were not necessary to repeal it.

Finally, we find that MAC has not presented a substantial or material question of fact regarding Capstar's character qualifications. Neither Capstar's programming nor its refusal to provide air time to supporters of Tom Barrett violated the Communications Act of 1934, as amended, or any Commission rule or policy. In addition, while MAC implies that the Governor's office provides talking points to one of the Station's on-air personalities,¹⁸ it does not submit an affidavit attesting to this fact from someone with personal knowledge as required by Section 309(d)(1) of the Act. Further, even if it had provided such an affidavit, MAC does not specify the provision of the Communications Act or the Commission's rules or policies this might violate.

We have evaluated the Application pursuant to Section 309(k) of the Act, and we find that the Station has served the public interest, convenience, and necessity during the most recent license term. Moreover, we find that there have been no serious violations of the Act or the Rules involving the Station which, taken together, would constitute a pattern of abuse. In light of the foregoing, we will grant the Application and renew the Station's license.

Accordingly, pursuant to Section 309(k) of the Communications Act of 1934, as amended and Sections 0.61 and 0.283 of the Rules, the Petition to Deny filed by Media Action Center on November 1, 2012, IS DENIED, and the application of Capstar TX LLC for renewal of its license for Station WISN(AM), Milwaukee, Wisconsin (File No. BR-20120801AQD) IS GRANTED. In addition, the complaint filed by Sue Wilson IS DENIED.

Sincerely,

William T. Lake
Chief, Media Bureau

¹⁸ Petition at 16.