



Federal Communications Commission  
Washington, D.C. 20554

August 20, 2014

*In Reply Refer to:*  
1800B3-JFS

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In re: **WGBH Educational Foundation**

WGBH(FM), Boston, Massachusetts  
Facility ID No. 70510  
File No. BRED-20131202BIA

WCRB(FM), Lowell, Massachusetts  
Facility ID No. 23441  
File No. BRH-20131202BIR

**Petition to Deny**

Dear Counsel:

We have before us (1) the above-referenced applications (“Renewal Applications”) filed by WGBH Educational Foundation (“Foundation”) for renewal of its licenses for noncommercial educational (“NCE”) Station WGBH(FM), Boston, Massachusetts, and Station WCRB(FM), Boston, Massachusetts (collectively, “Stations”);<sup>1</sup> (2) a Petition to Deny (“Petition”) both applications, filed by the Committee for Community Access (“CCA”) on March 4, 2014; and (3) several informal objection letters filed by listeners of the Stations (“Listener Letters”).<sup>2</sup> For the reasons set forth below, we treat the Petition as an informal objection, deny the Petition and the Listener Letters (collectively, “Objections”), and grant the Renewal Applications.<sup>3</sup>

**Background.** The Foundation filed the Renewal Applications on December 2, 2013. In its Petition, CCA states that WGBH(FM) “has thrown aside its many decades long tradition of providing jazz [music] all night, isolating it to only weekend evenings.”<sup>4</sup> CCA argues that WGBH(FM) is now a

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<sup>1</sup> WCRB(FM) is licensed as a commercial station but is operated by the Foundation as a NCE station.

<sup>2</sup> The Commission received informal objection letters from Mr. Steve Blake, Mr. David Bonetti, Ms. Juliet Eastland, Mr. Charles Olive, Ms. Bettina Norton, Ms. Carol Sloane, and Mr. Daniel Toner.

<sup>3</sup> CCA filed supplements to its Petition on March 6, 2014 (“Supplement 1”), supplying an affidavit CCA Chairman Jacob Bernstein in support of the Petition, and on March 14, 2014 (“Supplement 2”). The Foundation filed an opposition to the Petition (“Opposition”) on April 2, 2014. CCA filed a reply to the Opposition (“Reply”) on April 22, 2014.

<sup>4</sup> Petition at 1.

news-and-talk station “in a market already served by a full-time news and talk station,”<sup>5</sup> and that WGBH(FM)’s jazz format has since been “relegated” to WCRB(FM), a “weak suburban station”<sup>6</sup> that the Foundation “acquired ... for precisely that purpose.”<sup>7</sup> CCA argues that WGBH(FM) “specifically solicited [\$100 annual] memberships in its Jazz Club and its Classical Club so that listeners could show their support” for the now-discarded programming.<sup>8</sup> The Listener Letters raise similar concerns regarding membership solicitation and changes in WGBH(FM)’s program format.<sup>9</sup>

Although acknowledging that the Supreme Court has affirmed that the Commission could decline to entertain renewal challenges based on “format diversity,”<sup>10</sup> CCA argues that the Commission’s market-based approach to program format diversity should not apply to NCE stations.<sup>11</sup> Alternatively, CCA argues that market forces have failed to provide diversity in entertainment formats,<sup>12</sup> and asks the Commission to use the licensing proceedings of WGBH(FM) and WCRB(FM) “as a case study ... to reconsider its *Format Policy Statement*.”<sup>13</sup> Specifically, CCA argues that jazz music is associated with the black community,<sup>14</sup> and that in reducing its jazz programming, WGBH(FM) has discarded “the mission of public broadcasting of providing service not otherwise available in the community.”<sup>15</sup> Alternatively, CCA argues that the Commission’s format policy is inconsistent with “the audience’s First Amendment right to be served” and therefore should not be followed.<sup>16</sup>

Finally, citing the Commission’s *The Public and Broadcasting* manual, CCA argues that the Board of Trustees of the Foundation (“Board”) has “rejected its licensee obligations . . . to identify the needs and interests of its community and present programming that addresses those needs” by “inappropriately delegating programming decisions to its management staff.”<sup>17</sup> CCA references an e-mail from Jeanne Hopkins, VP, Communications & Government Relations for the Foundation, to CCA Chairman Jacob Bernstein, which reads in pertinent part: “WGBH Trustees do not have a role overseeing any WGBH programming, and funders have no involvement with the editorial content of programs.”<sup>18</sup>

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<sup>5</sup> *Id.* CCA lists WBUR-FM as a news-and-talk station already serving the Boston, Massachusetts, market.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> See generally Listener Letters.

<sup>10</sup> Petition at 3 (citing *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981)).

<sup>11</sup> Petition at 2. “[T]he Commission should hold public radio licensees to a higher standard than commercial licensees, ... [because] public broadcasting was created to serve those audiences that commercial broadcasters spurn as not lucrative enough.”

<sup>12</sup> *Id.* at 3-10; Reply at 4-12. CCA characterizes the “market failure” as a “full-blown market crisis.” Petition at 8.

<sup>13</sup> Petition at 8. See also *Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 FCC 2d 858 (1976) (“*Format Policy Statement*”); *recon. denied*, Memorandum Opinion and Order, 66 FCC 2d 78 (1977), *rev’d sub nom. WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979), *rev’d*, *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

<sup>14</sup> *Id.* at 9. The Foundation objects to this characterization, calling it “inflammatory.” Opposition at n.30.

<sup>15</sup> Petition at 9.

<sup>16</sup> *Id.* at 7-8 (citing Dissent in *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981)); Reply at 4-12.

<sup>17</sup> Supplement 2 at 1-3; see *The Public and Broadcasting: How to Get the Most Service from Your Local Station*, Revised July 2008, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-08-940A2.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-08-940A2.pdf).

<sup>18</sup> Supplement 2 at 1-3.

In its Opposition, the Foundation asserts that the e-mail “was simply clarifying that *individual* trustees do not direct or interfere with the editorial content of station programming.”<sup>19</sup> In addition, the Foundation argues that Commission policy affords licensees great discretion over format decisions and that renewal proceedings would be an inappropriate forum to consider changes in that policy.<sup>20</sup> Finally, the Foundation argues that the Stations have operated in the public interest, in accordance with the Commission’s renewal standards.<sup>21</sup> WGBH(FM) “provides comprehensive news coverage to the community ... [featuring] more than 12 hours a week of original programming.”<sup>22</sup> WCRB(FM) “remains a full-time classical music station serving listeners in Lowell, the city of Boston, and surrounding areas.”<sup>23</sup>

**Discussion. Procedural Matters.** Under sections 73.3516(e) and 73.3584(a) of the Commission’s Rules (“Rules”), petitions to deny an application for renewal of license must be filed “by the end of the first day of the last full calendar month of the expiring license term.”<sup>24</sup> In addition, Section 309(d)(1) of the Communications Act of 1934, as amended (“Act”) requires that petitions to deny “be supported by affidavit of a person or persons with personal knowledge” of the factual allegations made in the petition.<sup>25</sup> The licenses of the Stations, respectively, were set to expire April 1, 2014. Therefore, any petition to deny the Renewal Applications must have been filed, complete with any supporting affidavits, by March 4, 2014, the first day that the Commission was open for business after March 1, 2014.<sup>26</sup> Although CCA filed its Petition on March 4, 2014, CCA did not submit a supporting affidavit until March 6, 2014. CCA therefore failed to timely support its factual allegations with an affidavit as required by Section 309(d)(1) of the Act.<sup>27</sup> CCA asks the Commission to nevertheless excuse its error because the untimely filing “could not, by any stretch of the imagination, cause any cognizable prejudice to the Foundation.”<sup>28</sup> We decline to do so.<sup>29</sup> However, we will treat CCA’s Petition as an informal objection under Section 73.3587 of the Rules.<sup>30</sup>

**Substantive Matters.** Informal objections to license renewal applications must, pursuant to Section 309(e) of the Act, provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the renewal application would be *prima facie*

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<sup>19</sup> Opposition at n.20. Emphasis in original. CCA responds that the e-mail *could* have specified “*individual* trustees,” and because the e-mail failed to do so, the Foundation is “read[ing] things into its press release that simply aren’t there.” Reply at 3-4.

<sup>20</sup> Opposition at 4-8.

<sup>21</sup> *Id.* at 4-5 (citing 47 U.S.C. § 309(k)).

<sup>22</sup> *Id.* at 4.

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

<sup>24</sup> 47 C.F.R. §§ 73.3516(e), 73.3584(a).

<sup>25</sup> 47 U.S.C. § 309(d)(1).

<sup>26</sup> March 1, 2014, was a Saturday. Therefore, the filing deadline would have been Monday, March 3, 2014. However, that day was a federal snow day. See OPM Status Archives (<http://www.opm.gov/policy-data-oversight/snow-dismissal-procedures/status-archives/>). Under the Rules, the filing was due the next day, when the Commission’s headquarters was open. See 47 C.F.R. § 1.4(j).

<sup>27</sup> 47 U.S.C. § 309(d)(1).

<sup>28</sup> Reply at 2.

<sup>29</sup> See *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

<sup>30</sup> See *William Marsh Rice University*, Letter, 26 FCC Rcd 5966 (MB 2011) and *Farm and Home Broadcasting Company*, Letter, 24 FCC Rcd 11814 (MB 2009) (procedurally defective petitions to deny treated as informal objections); see also 47 C.F.R. § 73.3587 (informal objections may be filed any time prior to Commission action on the corresponding application).

inconsistent with Section 309(k) of the Act,<sup>31</sup> which governs our evaluation of an application for license renewal. If no such question is raised, the Commission will deny the informal objection.<sup>32</sup> Specifically, Section 309(k) of the Act provides that we are to grant a broadcast station's license renewal application if, upon consideration of the application and pleadings, we find with respect to that station 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.<sup>33</sup> 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(e) 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.”<sup>34</sup>

Format Change Policy. As CCA has acknowledged,<sup>35</sup> it is well-settled policy that with minor exceptions not relevant here the Commission does not scrutinize or regulate programming, nor does it take potential changes in entertainment programming formats into consideration in reviewing license renewal applications.<sup>36</sup> In 1976, the Commission issued a *Format Policy Statement* in which it concluded that review of entertainment program formats was not required by the Act, would not benefit the public, would deter innovation, and would impose substantial administrative burdens on the Commission.<sup>37</sup> The Supreme Court has upheld this policy and the Commission's determination that “the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters.”<sup>38</sup> Therefore, we find the format-based objections to the Renewal Applications without merit.

Furthermore, we decline to use this renewal proceeding “as a case study”<sup>39</sup> to reconsider the Commission's *Format Policy Statement* with regard to alleged “market failures.” When addressing matters of broad applicability, the Commission has preferred utilizing rulemaking proceedings and policy statements rather than fact-specific adjudicatory proceedings to give guidance and reasonable notice to licensees on “going forward” requirements.<sup>40</sup>

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<sup>31</sup> 47 U.S.C. §§ 309(e), 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), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

<sup>32</sup> 47 U.S.C. § 309(d)(2).

<sup>33</sup> 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described in the text by Section 204(a) or 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).

<sup>34</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

<sup>35</sup> Petition at 3-4.

<sup>36</sup> *See, e.g., KCOH, Inc.*, Letter, 28 FCC Rcd 1009 (MB 2013); *see also William Marsh Rice University*, Letter, 26 FCC Rcd 5966 (MB 2011); *The New York Times Radio, LLC*, Letter, 24 FCC Rcd 11761 (MB 2009); and *Cactus Communications, LLC*, Letter, 24 FCC Rcd 7632 (MB 2009).

<sup>37</sup> *Format Policy Statement*, 60 FCC 2d at 865-66.

<sup>38</sup> *See* 450 U.S. at 585.

<sup>39</sup> *See* Petition at 8.

<sup>40</sup> *See Cox Radio, Inc.*, Letter, 28 FCC Rcd 5674, 5677 (MB 2013) (“It has long been Commission practice to make decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rule making proceedings, not adjudications.”); *see also Sunburst Media L.P.*, Memorandum Opinion and Order, 17 FCC Rcd 1366, 1368 (2002); and *Great Empire Broadcasting, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 11145, 11148 (1999).

With respect to CCA's argument that the Commission's *Format Policy Statement* is inconsistent with a "First Amendment right to be served," the Supreme Court has considered and rejected this argument.<sup>41</sup> Therefore, we decline to consider CCA's First Amendment argument any further here, and we find that CCA's format policy arguments do not raise a substantial and material question of fact warranting further inquiry.

Delegation of Authority. The Commission "has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee."<sup>42</sup> Nevertheless, we find that CCA's argument that the Board has improperly delegated its programming decisions is based on a taken-out-of-context Foundation email and a misunderstanding of Commission policy. Although CCA is correct that the e-mail *could* have said "individual trustees"<sup>43</sup> to avoid any confusion, but did not, CCA misconstrues the pertinent language of the *Public and Broadcasting* manual. CCA is correct that "each station licensee" must affirmatively identify the needs and problems of its community of license, but we do not read that phrase strictly to suggest that "extensive delegation of authority by a licensee—commercial or educational—is in itself unworkable."<sup>44</sup> Rather, we mean only that "a licensee, educational or otherwise, may not delegate and subdelegate authority over a broadcast facility and thereby insulate itself from the ultimate responsibility for the operation of the station."<sup>45</sup> The Foundation stated that the Board remains ultimately responsible for station operation, and we find no evidence to the contrary. Accordingly, CCA has not made a prima facie showing that the Board has delegated station programming decisions to an extent that is inconsistent with its licensee obligations.

Solicitation of Membership Fees. The Commission is without jurisdiction to assess the merits of CCA's claim that WGBH(FM) "specifically solicited" membership fees for programming that was subsequently discarded.<sup>46</sup> While it may arise from broadcast-related activities, CCA's claim is most appropriately interpreted to allege that WGBH(FM) misrepresented itself to its members by changing the Station's programming format after seeking contributions to help retain the discarded format. The Commission has consistently held that such private disputes are beyond its regulatory jurisdiction and must be resolved in a local court of competent jurisdiction.<sup>47</sup>

**Conclusion/Actions.** We find that the Objections have not raised a substantial and material question of fact warranting further inquiry. Additionally, we have evaluated the above-referenced Renewal Applications pursuant to Section 309(k) of the Act, and we find that Stations WGBH(FM) and WCRB(FM) have each served the public interest, convenience, and necessity during their respective subject license terms. Moreover, we find that there have been no serious violations of the Act or the Rules involving either Stations WGBH(FM) or WCRB(FM), nor have there been any other violations involving either Stations WGBH(FM) or WCRB(FM) which, taken together, constitute a pattern of abuse.

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<sup>41</sup> See 450 U.S. at 604 ("We [do] not imply that the First Amendment grants individual listeners the right to have the Commission review the abandonment of their favorite entertainment programs.").

<sup>42</sup> *Trustees of the University of Pennsylvania Radio Station WXPN(FM) Philadelphia, Pennsylvania*, Decision, 69 FCC 2d 1394, 1397 (1978).

<sup>43</sup> Reply at 3-4.

<sup>44</sup> See 69 FCC 2d at 1420.

<sup>45</sup> *Id.* See also *Solar Broadcasting Co., Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 5467, 5486 (2002).

<sup>46</sup> See Petition at 2.

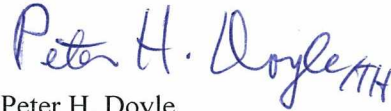
<sup>47</sup> See, e.g., *Trinity International Foundation, Inc.*, Letter, 23 FCC Rcd 4000 (MB 2008) (petitioner's claim that solicitation of donations prior to an upcoming format change constitutes fraud is "contractual in nature and therefore involve[s] 'non-FCC' misconduct.).

Accordingly, IT IS ORDERED, that the Petition to Deny filed by the Committee for Community Access IS DENIED. IT IS FURTHER ORDERED THAT the Informal Objections filed by Mr. Steve Blake, Mr. David Bonetti, Ms. Juliet Eastland, Mr. Charles Olive, Ms. Bettina Norton, Ms. Carol Sloane, and Mr. Daniel Toner ARE DENIED.

IT IS FURTHER ORDERED that the application for renewal of license of Station WGBH(FM), Boston, Massachusetts (File No. BRED-20131202BIA) IS GRANTED.

IT IS FURTHER ORDERED that the application for renewal of license of Station WCRB(FM), Lowell, Massachusetts (File No. BRH-20131202BIR) IS GRANTED.

Sincerely,

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

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Mr. Steve Blake  
Mr. David Bonetti  
Ms. Juliet Eastland  
Mr. Charles Olive  
Ms. Bettina Norton  
Ms. Carol Sloane  
Mr. Daniel Toner