



Federal Communications Commission
Washington, D.C. 20554

March 4, 2015

In Reply Refer to:
1800B3-SS

Mr. John W. Nelson, Jr.
5221 Farrington Road
Bethesda, MD 20816

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In re: **American University**
WAMU(FM), Washington, DC
Facility ID No. 65399
File No. BRED-20110511AHK

Petition to Deny

Dear Counsel and Mr. Nelson:

We have before us: (1) the referenced application for renewal of license ("Application") of noncommercial educational ("NCE") FM Station WAMU(FM), Washington, DC ("Station"), filed by the Executive Committee of the Board of Trustees of American University ("AU" or "Licensee"); and (2) a September 1, 2011, Petition to Deny ("Petition") the Application filed by John W. Nelson, Jr. ("Nelson").¹ For the reasons set forth below, we deny the Petition and grant the Application.

Background. AU timely filed the Application on May 11, 2011.² On September 1, 2011, Nelson timely filed the Petition,³ arguing that: (1) the 2010 fourth quarter issues/programs list is missing from the Station's public inspection file;⁴ (2) the Station's average of 15-16 community issues per quarter in its issues/programs list "seems inadequate for a not-for-profit station with a community and educational focus";⁵ (3) the Station's corporate underwriting exceeded 50 percent of the Station's support from

¹ On September 28, 2011, AU filed an Opposition, to which Nelson replied on October 17, 2011.

² Radio stations in Washington, DC, were to file their renewal applications by June 1, 2011, with the licenses expiring October 1, 2011. See 47 C.F.R. § 73.1020.

³ Under 47 C.F.R. § 73.3516(e), petitions to deny the Application were to be filed by September 1, 2011.

⁴ Petition at 1.

⁵ *Id.* at 2.

unaffiliated contributors;⁶ (4) Licensee spends more than a quarter of its total revenue on fundraising;⁷ (5) the Station is “essentially selling spots” when soliciting corporate contributions;⁸ (6) the Station is biased in that it will not cover any news stories involving the university;⁹ and (7) the Station ignored the firing of AU’s Senior Director of Financial Management (“SDFM”), and thus, is guilty of “possible censorship” as well as having governance, management, and character issues.¹⁰

In its Opposition, AU argues that apart from the missing fourth quarter 2010 issues/programs list allegation – which AU claims is false¹¹ – the Petition does not allege a violation of any Commission regulation or policy at the Station.¹² AU therefore requests that the Petition be dismissed or denied and that the Application be granted.¹³

In Reply, Nelson asserts his standing to file the Petition; claims that the termination of the SDFM goes directly to the “character requirement” for Commission licensees; and reiterates claims made in the Petition. In addition, Nelson asserts that the copy of the missing fourth quarter 2010 issues/programs list provided as an exhibit in the Opposition does not contain a “date stamp.”¹⁴

Discussion. A petition to deny an application for renewal of license must, pursuant to Section 309(d) of the Communications Act of 1934, as amended (“Act”),¹⁵ 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,¹⁶ 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 Commission’s Rules (“Rules”); and (3) there have been no other violations that, taken together, constitute a pattern of abuse.¹⁷ If, however, the licensee fails to meet that standard, the Commission may deny the

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ *Id.* at 4-9.

¹¹ AU claims that the missing list was inside the public inspection file but that it was “outside rather than inside the folder containing the issues/programs lists for the first three quarters of 2010.” Opposition at 2. AU attaches a copy of the missing list to its Opposition. *See id.* at Exhibit B; *see also* “Declaration of Anne S. Healy” executed on September 27, 2011 (“Healy Declaration”), n.22, *infra*.

¹² Opposition at 6.

¹³ *Id.* at 7.

¹⁴ Reply at 3.

¹⁵ 47 U.S.C. § 309(d).

¹⁶ *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).

¹⁷ 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)* (continued . . .)

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.”¹⁸

Initially, Nelson’s allegations that the Station’s corporate underwriting exceeded 50 percent of the Station’s support from unaffiliated contributors; that 15-16 community issues per quarter are inadequate; and that AU spends more than one quarter of its total revenue on fundraising, are claims that, even if true, we find fail to allege any violation of the Act or Rules or allege actions completely outside the Commission’s jurisdiction or purview.¹⁹ Accordingly, no further inquiry or discussion is warranted on these matters.

With regard to Nelson’s claim that Licensee did not properly maintain the Station’s public inspection file, Licensee certifies in the Application that the documentation required by Section 73.3527 of the Rules²⁰ had been placed in the local public file at appropriate times.²¹ Licensee also submits a declaration made under penalty of perjury by the Station’s Community Relations Manager, Anne S. Healy,²² declaring that the alleged missing fourth quarter 2010 issues/programs list was contained in the file but outside the appropriate folder. Notwithstanding the conflicting statements from Licensee and Nelson as to whether the fourth quarter 2010 issues/programs list was placed in the Station’s public file, even if Nelson were correct, his allegation would warrant at most an admonishment; such a violation would not justify denial or designation of the license renewal application or demonstrate a pattern of non-compliant behavior. Therefore, further consideration of this issue is unwarranted.

Concerning Nelson’s claim that the Station is “essentially selling spots” when it solicits corporate contributions, Section 73.503(d) of the Rules stipulates that “no *promotional* announcement *on behalf of for profit entities* shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees.”²³ There is no legal prohibition against soliciting contributions from any source (other than political candidates) on or off the air.²⁴ Nelson does

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and 204(c) of the Telecommunications Act of 1996 (*Broadcast License Renewal Procedures*), Order, 11 FCC Rcd 6363 (1996).

¹⁸ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

¹⁹ See, e.g., *CSN International*, Order, 21 FCC Rcd 13375, 13376 (EB 2006) (Section 73.3527(e)(8) of the Rules requires licensees to place in the public inspection file, for each calendar quarter, a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period, but does not specify a minimum number of community issues or responsive programs for such list); see also, e.g., *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, Memorandum Opinion and Order, 90 FCC 2d 895, 912 (1982) (on fundraising, Commission relies upon public broadcasters' good faith judgments and primary interest in serving the public; it does not believe it desirable to fashion narrow rules which will circumscribe a licensee's discretion and flexibility in fundraising activities).

²⁰ 47 C.F.R. § 73.3527.

²¹ See Application at Section III, Item 3.

²² See Opposition at Exhibit A, “Healy Declaration,” executed on September 27, 2011.

²³ 47 C.F.R. § 73.503(d).

²⁴ See, e.g., *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, Second Report and Order, 86 FCC 2d 141, 147 (1981) (public stations rely primarily on government and private
(continued . . .)

not allege that the Station promotes any commercial product or service in return for consideration by virtue of announcements in violation of Section 73.503(d) of the Rules. Accordingly, no further inquiry is required here.

Nelson also alleges that the Station is biased against covering news involving the university, adding that the Station possibly censored the story of the firing of AU's former SDFM.²⁵ In its Opposition, AU disagrees and submits evidence that the Station does, in fact, cover news related to the school and argues that the termination of the former SDFM was not a matter for a "public forum."²⁶ In his Reply, Nelson acknowledges that it is "up to the Commission" to decide whether he has demonstrated a lack of coverage of "community issues" by the Station.²⁷

The choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee's good faith discretion.²⁸ The First Amendment of the Constitution and Section 326 of the Act prohibit the Commission from exercising any power of censorship over broadcast station programming.²⁹ With certain limited exceptions not applicable here,³⁰ Licensees are entitled to broad discretion in the scheduling, selection and presentation of news programming.³¹ This is particularly so with regard to the programming decisions of NCE broadcast stations because the Commission historically "has had the appropriately limited role of facilitating the development of the public broadcasting system rather than determining the content of its programming."³² We find that Nelson has not shown that AU

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contributions).

²⁵ Petition at 3. AU notes in its Opposition that the former SDFM bears the same surname as Nelson and resides at the same address as Nelson. See Opposition at 6, n.25.

²⁶ See Opposition at Exhibit B, "Declaration of [Station News Director] James Asendio," sworn under penalty of perjury; executed on September 28, 2011. Asendio declares that the Station does not have any special policy regarding news coverage of the university and attaches several scripts from news stories broadcast on the Station in 2011 that involved the university; see also Opposition at 6.

²⁷ Reply at 4.

²⁸ See *Oregon Alliance to Reform Media, c/o Andrew Jay Schwartzman, Esq.*, Letter, 22 FCC Rcd 15183 (MB 2007) ("*Oregon Alliance*") citing *American Broadcasting Companies, Inc.*, Memorandum Opinion and Order, 83 FCC 2d 302, 305 (1980) ("*ABC*").

²⁹ U.S. Const., Amend I; 47 U.S.C. § 326.

³⁰ The Commission has repeatedly held that absent extrinsic evidence that a licensee has intentionally staged news events or deliberately distorted news programming, "the Commission will not review the licensee's news judgments." *American Broadcasting Companies, Inc.*, Memorandum Opinion and Order, 83 FCC 2d 302, 305 (1980).

³¹ See, e.g., *National Broadcasting Company v. FCC*, 516 F.2d 1101, 1112-1113, 1119-1120, 1172 (D.C. Cir. 1974), cert denied sub nom. *Accuracy in Media Inc. v. National Broadcasting Company*, 424 U.S. 910 (1976); see also *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. 94, 124 (1973); *Hunger in America*, Memorandum Opinion and Order, 20 FCC 2d 143, 150-151 (1969). See also *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993) (licensees have broad discretion over programming decisions).

³² See *Stephen Diliberto and Kevin M. Walsh, Esq.*, Letter, 22 FCC Rcd 12983, 12984 (MB 2007) quoting *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, Notice of Proposed Rule Making, 87 FCC 2d 716, 732 (1981).

abused its discretion. Because Nelson has not supplied extrinsic evidence of any intentional incidents of news suppression or distortion,³³ we will not review Licensee's news judgments.³⁴

Finally, Nelson's claims of governance, management and character issues at the Station also revolve around the termination of the former SDFM (a university employee but not an employee at the Station), but do not appear involve discrimination based on race, color, religion, national origin, or sex.³⁵ Neither do his allegations concern any matter reportable by the Station under the Commission's EEO Rules³⁶ or within the Commission's purview under its *Character Policy Statement*.³⁷ Rather, Nelson's unsupported contentions regarding the alleged rights of the former SDFM under her employment contract relate to a private dispute.³⁸ It is well-settled that private disputes are best resolved by local courts of competent jurisdiction, as the Commission has neither the authority nor the competence to adjudicate private disputes.³⁹ To the extent that Nelson suggests that any alleged mistreatment of the former SDFM might be a prelude to similar future behavior that might affect the Station,⁴⁰ these are purely speculative allegations based on possible future events and as such do not justify further consideration.⁴¹

Conclusion/Actions. Nelson's evidence, as set forth in the Petition and attested to in his Affidavit,⁴² is insufficient to support his allegations and do not rise to the level necessary to find a

³³ See *ABC*, 83 FCC 2d at 305.

³⁴ See, e.g., *KMAP, Inc.*, Memorandum Opinion and Order, 72 FCC 2d 241, 244 (1979) (pattern of disagreement between a licensee and an individual over news coverage does not necessarily constitute news distortion or suppression).

³⁵ See 47 C.F.R. § 73.2080.

³⁶ See FCC Form 396 (Broadcast EEO Program Report). Section VII of the form requires that stations "must provide . . . a brief description of any complaint which has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the station including the persons involved, the date of filing, the court or agency, the file number (if any), and the disposition or current status of the matter."

³⁷ See, e.g., *Red Zebra Broadcasting Licensee LLC*, Letter, 29 FCC Rcd 15495 (MB 2014) (citing *In the Matter of Policy Regarding Character Qualifications In Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees*, Report, Order, and Policy Statement, 102 FCC 2d 1079 (1986), modified, Policy Statement and Order, 5 FCC Rcd 3252 (1990), recon. granted in part, Memorandum Opinion and Order, 6 FCC Rcd 3448 (1991), modified in part, Memorandum Opinion and Order, 7 FCC Rcd 6564 (1992).

³⁸ See *Applications of WHOA-TV, Inc. (Assignor) and Park of Montgomery II, Inc. (Assignee) and Park Acquisitions, Inc. (Transferor) and Media General, Inc. (Transferee)*, Memorandum Opinion and Order, 11 FCC Rcd 20041, 20043 (1996) (unsupported contentions regarding alleged rights under employment contract relate to a private dispute).

³⁹ See *John F. Runner, Receiver*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976) (local court of competent jurisdiction, not the FCC, is the proper forum to resolve private disputes).

⁴⁰ Petition at 6.

⁴¹ See, e.g., *Secret Communications II, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 9139, 9149, ¶ 24 (2003) (speculative allegations are inadequate to raise a substantial and material question of fact).

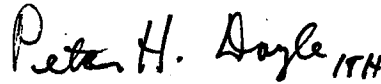
⁴² See "Affidavit of John W. Nelson, Jr.," sworn to but not made under penalty of perjury, executed on August 30, 2011 (attached to Petition) ("Affidavit").

substantial and material question of fact regarding AU's qualifications to be a Commission licensee. Additionally, 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 or any other violations that, 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, IT IS ORDERED that, the Petition filed on September 1, 2001, by John W. Nelson, Jr., IS DENIED.

IT IS FURTHER ORDERED that, pursuant to Section 309(k) of the Communications Act of 1934, as amended, the license renewal application of the Executive Committee of the Board of Trustees of American University, for Station WAMU(FM), Washington, DC (File No. BRED-20110511AHK) IS GRANTED.

Sincerely,

Handwritten signature of Peter H. Doyle in black ink, with the initials "PH" at the end.

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Executive Committee of the Board
of Trustees of American University