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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications for Renewal of Licenses	)	File No. BRED-20131202BIA
of WGBH-FM and WCRB-FM	)	File No. BRH-20131202BIR

OPPOSITION TO APPLICATION FOR REVIEW

WGBH Educational Foundation ("WGBH"), licensee of noncommercial educational broadcast FM radio stations WGBH(FM), Boston, Massachusetts ("WGBH(FM)"), and WCRB(FM),[1] Lowell, Massachusetts ("WCRB(FM)," and together with WGBH(FM), "the Stations"), hereby submits this Opposition to the Application for Review filed by the Committee for Community Access ("CCA),[2] pursuant to Section 1.115(d) of the Commission's rules.[3]

Twice now, the Media Bureau has reviewed and rejected CCA's arguments and correctly concluded both that CCA failed to file a timely Petition to Deny the renewals and that, in any case, CCA failed on the merits to raise any substantial and material question with respect to whether the Stations met the statutory standard for renewals.[4] Accordingly, the Bureau granted WGBH's applications to renew the Stations' licenses.[5] CCA's third repetition of the

[1] WCRB(FM) is licensed as a commercial station but operated by WGBH as a noncommercial educational station.

[2] The Committee for Community Access's Application for Review by the Full Commission, File Nos. BRED-20131202BIA and BRH-20131202BIR (filed Jan. 9, 2015) ("AFR").

[3] 47 C.F.R. § 1.115(d).

[4] *WGBH Educational Foundation*, Letter, File Nos. BRED-20131202BIA and BRH-20131202BIR, at 3, 5 (MB Aud. Div. Aug. 20, 2014) (citing 47 U.S.C. § 309(k)) ("*Bureau Grant*"); *WGBH(FM)*, Letter, File Nos. BRED-20131202BIA and BRH-20131202BIR, at 3-4 (MB Aud. Div. Dec. 10, 2014) ("*Recon Order*").

[5] *Bureau Grant* at 1.

same "facts" and meritless arguments is no more persuasive.[6] Accordingly, the Commission should dismiss or deny CCA's AFR.

I. CCA HAS NO STANDING TO SEEK REVIEW OF THE STATIONS' RENEWALS.

As the Bureau correctly determined, CCA lacked standing to seek reconsideration of the Stations' license renewals because CCA failed to participate as a party earlier in the proceeding and failed to show "good reason" why such participation was not possible.[7] Thus, the Commission should deny the AFR's challenge to the Bureau's standing analysis and otherwise dismiss the AFR.

CCA concedes that it failed to timely file a complete petition to deny the Stations' renewals.[8] CCA argues that it was "inappropriate" for the Bureau to enforce the deadline established in the Commission's rules by treating CCA's untimely petition to deny as an informal objection, relying on CCA's characterization of how "similar federal statutes are construed by the courts and other agencies."[9] Notably absent from the AFR is any discussion — or even acknowledgment — of the Commission's waiver standards, as set forth in the Commission and judicial precedents cited in the *Bureau Grant* and the *Recon Order*. As the

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[6] *See* AFR at 1 n.1 (stating that AFR consists of "a condensation of CCA's prior submissions in this proceeding" and referring Commission to CCA's prior pleadings). Indeed, considering the AFR's continued reliance on distorted facts and its disregard for Commission and judicial precedent limiting the proper scope of renewal proceedings, the AFR verges on becoming an improper "strike" pleading. *See Shareholders of Pulitzer Publishing Co.*, Mem. Op. & Order, 13 FCC Rcd 22875, 22895 (MMB 1998) (in considering whether pleading constitutes "strike" pleading primarily intended to cause delay, Commission considers, *inter alia*, "the absence of any reasonable basis for the adverse allegations in the petition").

[7] *Bureau Grant* at 3; *Recon Order* at 3.

[8] AFR at 3 (conceding that CCA failed to timely file required affidavit).

[9] AFR at 3, 5.

U.S. Court of Appeals for the D.C. Circuit has held — in a decision cited by the *Bureau Grant*[10] and the *Recon Order*[11] — it would have been arbitrary and capricious to waive the Commission-established deadline unless the Bureau could "explain why deviation better serves the public interest, *and* articulate the nature of the special circumstances" justifying a waiver of the deadline.[12] The *Recon Order* further explained that "*NetworkIP* follows *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990), and together the cases establish the standard for waiver of Commission rules that has been applied in numerous cases."[13] The AFR makes no attempt to justify its requested waiver under these authorities, nor could it. As the *Recon Order* recognizes, CCA's failure to familiarize itself with the Commission's procedural requirements[14] "does not constitute special circumstances that would warrant a waiver" under the Commission's standards,[15] and the AFR cites no authority to the contrary.[16]

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[10] *Bureau Grant* at 3 n.29.

[11] *Recon Order* at 2 n.6.

[12] *NetworkIP, LLC v. FCC,* 548 F.3d 116, 127 (D.C. Cir. 2008) (emphasis in original).

[13] *Recon Order* at 3 n.14.

[14] *See* AFR at 3-4 (asserting that CCA's error should be excused because CCA misunderstood the Commission's broadcast renewal schedule and accordingly had to "rush to find counsel and get the petitions to deny filed").

[15] *Recon Order* at 3 n.12 (citing *APCC Services, Inc. v. CCI Communications, LLC*, Order on Review, 28 FCC Rcd 564, 571 (2013), and *Profit Enterprises, Inc.*, Forfeiture Order, 8 FCC Rcd 2846 (1993), for proposition that "parties appearing before the Commission ... are charged with knowledge of its rules").

[16] CCA's attempt to rely on the *United Church of Christ* cases is unavailing. *See* AFR at 6-7. The D.C. Circuit held that "some 'audience participation' must be allowed in license renewal proceedings," and thus that the Commission's existing standing rules were impermissible. *See Office of Comm'cn of United Church of Christ v. FCC*, 359 F. 2d 994, 1005 (D.C. Cir. 1966) ("*UCC I*"). However, the court noted that the Commission was free to "develop[] appropriate regulations by statutory rulemaking" to govern such participation. *Id.* The Commission has done so by, for instance, establishing the deadline for the filing of petitions to deny, *see* 47 C.F.R. §§ 73.3516(e), 73.3584(a), which by statute must include an affidavit supporting any necessary factual allegations, 47 U.S.C. § 309(d)(1). CCA does not challenge the general validity of the (continued...)

Thus, the Bureau correctly denied CCA standing as a party to this proceeding. As a non-party, CCA could not seek reconsideration of the *Bureau Grant* unless it could demonstrate *both* that CCA's interests are "adversely affected" by the decision *and* that there was "a good reason why it was not possible for [CCA] to participate earlier as a party."[17] CCA fails both requirements. As the *Recon Order* noted, CCA clearly could have participated as a formal party earlier in the proceeding "by filing a complete and timely petition to deny by the filing deadline."[18] Instead, CCA filed an incomplete petition to deny on the last possible day, and then failed to correct the petition's deficiency until the deadline had passed.[19] CCA thereby gave up its opportunity to participate as a formal party, and accordingly has no standing to seek reconsideration or Commission review of the *Bureau Grant*.[20] In any case, CCA cannot show that it or the listeners it claims to represent are "adversely affected" by the Stations' license renewals. As the Bureau correctly found, CCA's allegation that WGBH fails to adequately control the Stations is meritless,[21] and longstanding Commission precedent makes clear that CCA's complaints regarding the Stations' formats are not cognizable in license-renewal

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Commission's standing requirements, and nothing in *UCC I* entitles CCA to ignore valid procedural requirements, including Commission-established deadlines.

[17] *Sagittarius Broad. Corp.*, Mem. Op. & Order, 18 FCC Rcd 22551, 22553 n.15 (2003) (citing 47 C.F.R. § 1.106(b)(1)); *see also Univ. of North Carolina*, Mem. Op. & Order, 4 FCC Rcd 2780, 2780 (1989) (informal objector lacked standing to seek reconsideration because it failed to show "that it was adversely affected by the decision and that there was a good reason why it could not participate in the earlier stages of the proceeding as a party").

[18] *Recon Order* at 3.

[19] *Id.*

[20] *See Sagittarius*, 18 FCC Rcd at 22553 ("[A] person generally does not have standing to seek further redress thereafter unless he was a formal participant at the initial stage."); *David Ryder*, Letter, 24 FCC Rcd 10874, 10875 (MB Aud. Div. 2009) ("A 'nonparty' participating earlier in the proceeding as an informal objector is without standing to seek reconsideration.").

[21] *Bureau Grant* at 5; *Recon Order* at 4.

proceedings.[22] Any change in the Commission's format policy would have to be made through a prospective rulemaking and could not affect the Commission's analysis of whether the Stations qualified for renewal in their prior license terms.

II. THE AFR PRESENTS NO BASIS FOR QUESTIONING THE BUREAU'S DECISION.

Even if CCA had standing to seek review — which it does not — the AFR presents no reason to question the Bureau's findings. CCA raises two alleged merits-related errors: (1) that the Bureau improperly put the burden of proof on CCA, rather than WGBH, and improperly applied the Commission's licensee-control policies in rejecting CCA's allegation regarding WGBH's control of the Stations,[23] and (2) that the Bureau improperly refused "to allow CCA the opportunity to make a record for the commission to reconsider its [format] policy by holding a hearing."[24]

CCA's first allegation of error is simply wrong: It is CCA, not WGBH, that bears the burden of demonstrating the existence of a substantial and material question regarding the Stations' qualifications for renewal, a burden CCA failed to satisfy.

The second alleged "error" is nonsensical. The purpose of a hearing in a licensing proceeding is to resolve any "substantial and material question of fact" raised in connection with the relevant license application.[25] The Commission has, through rulemaking, determined that *no* complaint based on a viewer's disagreement with the Stations' program formats may be considered in determining whether to renew the Stations' licenses. Accordingly, CCA's format-

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[22] *Bureau Grant* at 4; *Recon Order* at 4.

[23] AFR at 1.

[24] AFR at 3.

[25] 47 U.S.C. § 309(e).

based complaints are legally incapable of raising any "substantial and material question of fact" necessitating a hearing. Although CCA is free to advocate for the Commission to commence a rulemaking to alter its format policies going forward, the Commission could not apply such a radical policy reversal retroactively in these proceedings. Thus, CCA's Petition presents no justification for reversing the Bureau's decisions in these proceedings.

A. CCA Raises No Serious Question Regarding WGBH's Control of the Stations.

The AFR reiterates CCA's allegation, first raised in a supplement to its Petition to Deny,[26] that WGBH failed "to maintain overall control over the programming of its stations."[27] The AFR asserts, in a willfully misleading fashion, that WGBH made a "public statement that its governing board of trustees had no role in programming."[28] Otherwise, the AFR relies entirely on its incorporation of CCA's prior pleadings by reference.[29] As before, CCA's assertions are based on a misstatement of the facts and a misunderstanding of the law.

As the challenger seeking to block the Stations' license renewals, it is well settled that CCA bore the initial burden of presenting enough specific facts to establish a "substantial and material question under the license renewal standard."[30] The D.C. Circuit has explained that

[26] The Committee for Community Access's Supplement to its Petitions To Deny Renewal, File Nos. BRED-20131202BIA and BRH-20131202BIR, at 2-3 (filed March 14, 2014) ("Supplement").

[27] AFR at 1.

[28] *Id.*

[29] *Id.* at 1-2.

[30] *See Sagittarius Broad. Corp.*, 18 FCC Rcd at 22552; *see also WWOR-TV, Inc.*, Mem. Op. & Order, 6 FCC Rcd 193, 197 n.10 (1990) (informal objections must "allege[] properly supported specific facts that, if true, would establish a substantial and material question of fact that a grant of the application would be inconsistent with the public interest"); *Mr. Rod Kovel*, Letter, 23 FCC Rcd 1884, 1885 (MB Aud. Div. 2008) ("[A]n informal objection must 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.").

a question is "substantial" only if the Commission, after weighing a challenger's allegations against the other evidence presented, concludes that "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for."[31] The Bureau correctly concluded that CCA's control allegation "simply did not meet this burden" because WGBH "sufficiently explained that the evidence relied upon was taken out of context and did not reflect an improper delegation of control of the Station's programming."[32]

Throughout these proceedings, CCA's sole support for its allegation has been an out-of-context interpretation of a statement sent to CCA's president on February 27, 2014, by Jeanne Hopkins, WGBH's Vice President for Communications and Government Relations.[33] In late 2013 and early 2014, certain activists mounted a campaign calling on WGBH to remove David Koch from its Board of Trustees, arguing that Mr. Koch's position as a trustee was incompatible with Mr. Koch's support for conservative organizations that "dispute evidence of climate change."[34] As Ms. Hopkins' message makes plain, WGBH's statement — which explained that "WGBH Trustees do not have a role overseeing any WGBH programming, and funders have no involvement with the editorial content of programs" — was a response to the concerns raised about whether Mr. Koch would, as an *individual* trustee, exert undue influence over the content of WGBH's programming choices.[35]

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[31] *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F. 2d 392, 395 (D.C. Cir. 1985).

[32] *Recon Order* at 4.

[33] Petition at 7; Supplement at 1-2.

[34] *See* Dru Sefton, "Activists turn up heat on WGBH over role of David Koch," Current.org, http://www.current.org/2014/04/activists-turn-up-heat-on-wgbh-over-role-of-david-koch/ (April 8, 2014) (noting that "ongoing campaign" to remove Koch was "initiated last fall").

[35] *See* Supplement at 5 ("I understand you called requesting WGBH's statement related to our Trustees and Mr. Koch. Below is the statement we have made available.").

WGBH's explanation of the relevant context is corroborated not only by contemporaneous press accounts but also by the message attached to *CCA's own pleading*, in which Ms. Hopkins clearly indicates that WGBH's statement relates to the issues involving "our Trustees and Mr. Koch."[36] Moreover, as the Bureau explained, CCA's control allegations ignore the actual contours of the Commission's control policies, which allow "extensive delegation of authority by a licensee" so long as the licensee does not "thereby insulate itself from the ultimate responsibility for the operation of the station."[37] WGBH has never engaged in such insulation. To the contrary, the Board of Trustees as a whole explicitly retains responsibility "for all governance including fiscal oversight, FCC compliance, policy decisions, and advancing the mission of the WGBH Educational Foundation."[38] Aside from its distortion of Ms. Hopkins' message, CCA has never presented any facts calling the Board's authority over the Stations into question. Accordingly, the totality of the evidence raises no genuine doubt that WGBH has maintained the required degree of control over the Stations.

B. The Bureau Correctly Rejected CCA's Attempt to Revisit the Commission's *Format Policy Statement* in These Proceedings.

Throughout these proceedings, the heart of CCA's argument has been that the Commission should deny the Stations' renewal applications unless WGBH agrees to change its programming to suit CCA's preferences.[39] Specifically, CCA objects to WGBH having reduced

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[36] Supplement at 5.

[37] *Bureau Grant* at 5 (citing *Trustees of the University of Pennsylvania Radio Station WXPN(FM) Philadelphia, Pennsylvania,* Decision, 69 F.C.C.2d 1394, 1397 (1978), and *Solar Broadcasting Co., Inc.,* Memorandum Opinion and Order, 17 FCC Rcd 5467, 5486 (2002)).

[38] *See* "WGBH | Board of Trustees," http://www.wgbh.org/about/BoardofTrustees.cfm (last visited September 26, 2014); Opposition to Petition to Deny, File Nos. BRED-20131202BIA and BRH-20131202BIR, at 5 n.20 (filed April 2, 2014) ("Opposition").

[39] The Committee for Community Access's Corrected Petitions To Deny Renewal, File Nos. BRED-20131202BIA and BRH-20131202BIR, at 1 (filed March 4, 2014) ("Petition to Deny"); (continued...)

the number of hours of jazz programming carried on WGBH(FM) and having moved its classical music programming to WCRB(FM).[40] However, as the Bureau correctly concluded — and as the Petition concedes — any complaint based on the Stations' format choices is simply irrelevant in renewal proceedings under long-standing Commission policy.[41]

Four decades ago, the Commission engaged in a rulemaking to consider what role, if any, the Commission should play in evaluating proposed changes to broadcast stations' entertainment formats.[42] After reviewing "extensive public comment on virtually every aspect of this matter,"[43] the Commission correctly concluded "that review of program formats was not required by the Communications Act ... would not benefit the public, would deter innovation, and would impose substantial administrative burdens on the Commission."[44] The *Format Policy Statement* recognized that the costs and uncertainties resulting from Commission oversight of stations' format decisions also "have a constitutional dimension," with the chilling effect of such oversight likely to "result[] in an inhibition of constitutionally protected forms of communication with no off-setting justifications."[45]

CCA is dissatisfied with the *Format Policy Statement*, and the AFR makes clear that CCA's true goal is to misuse this proceeding to effect broad changes in the Commission's

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The Committee for Community Access's Reply to the Opposition to its Petitions To Deny Renewal, File Nos. BRED-20131202BIA and BRH-20131202BIR, at 1 (filed April 22, 2014) ("CCA Reply").

[40] Petition to Deny at 1.

[41] *Recon Order* at 4; *Bureau Grant* at 4; Petition to Deny at 7.

[42] *Changes in the Entertainment Formats of Broadcast Stations*, Mem. Op. and Order, 60 F.C.C.2d 858, 858 (1976) ("*Format Policy Statement*")

[43] *Format Policy Statement*, 60 F.C.C.2d at 865.

[44] *Marnie K. Sarver, Esq.*, Letter, 28 FCC Rcd 1009, 1010 (MB Aud. Div. 2013) (citing *Format Policy Statement*, 60 F.C.C.2d at 865-66).

[45] *Format Policy Statement*, 60 F.C.C.2d at 865.

renewal policies. The Commission has long expressed concern that petitions to deny could be used "for other than their intended purpose," such as "for private financial gain, to settle personal claims, or as an emotional outlet."[46] CCA's attempt to convert the Stations' renewal application proceedings into a backdoor rulemaking — at significant expense to WGBH — is similarly inappropriate. Indeed, the AFR states that the entire purpose of the hearing CCA demands would be for "the Commission [to] review its decision to rely solely on market forces to provide an adequate variety of entertainment programming to serve the public's interests," and to consider whether to accept future petitions to deny based on allegations that "market forces have not produced adequate variety."[47] The appropriate means through which to pursue such goals — misguided as they are — would be a petition for rulemaking, in which all interested parties would have a full opportunity to participate and clear notice, in advance, of any policy changes.

Even if the Commission were inclined to entertain CCA's request to revisit the *Format Policy Statement*, the radical policy shift CCA advocates could not be applied in assessing the Stations' renewal applications.[48] Denying the Stations' renewals on the basis of format considerations that have been explicitly repudiated for decades would be arbitrary and capricious, and would violate the renewal expectancy established by Section 309(k).[49] As the Supreme Court has emphasized, the Commission may not penalize stations for failing to anticipate an abrupt reversal of the Commission's settled rules — particularly with respect to

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[46] *Amendment of Sections 1.420 & 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3912 (1990).

[47] AFR at 8.

[48] *See Bureau Grant* at 4 (citing *Sunburst Media L.P.*, Mem. Op. & Order, 17 FCC Rcd 1366, 1368 (2002); *Great Empire Broadcasting, Inc.*, Mem. Op. & Order, 14 FCC Rcd 11145, 11148 (1999); and *Cox Radio, Inc.*, Letter, 28 FCC Rcd 5674, 5677 (MB 2013).

[49] *See* Opposition at 7-8.

rules "that touch upon sensitive areas of basic First Amendment freedoms."[50] Conditioning the Stations' renewals on their adherence to CCA's preferred programming formats[51] would be a similarly unlawful reversal of settled policies, would improperly interfere with WGBH's responsibility as licensee to make programming choices based on its independent judgment regarding the needs and interests of its community, would unlawfully discriminate against WGBH as compared to similarly situated broadcasters not subject to such programming restrictions,[52] and would seriously infringe on WGBH's First Amendment rights. Thus, because it would be improper for the Commission to retroactively apply any change in the *Format Policy Statement* to the Stations' renewal applications, there is no justification for considering such arguments in these proceedings.

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For the reasons discussed herein, the Commission should dismiss or deny CCA's Application for Review. Even if CCA had standing to challenge the Bureau's decision to renew the Stations' licenses — which it does not — CCA has provided no basis for doing so. The Commission should not tolerate CCA's inappropriate and repetitive attempts to change longstanding policies adopted through notice-and-comment rulemakings in the context of an individual license renewal adjudication. Enough is enough.

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[50] *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2318 (2012).

[51] *See* CCA Reply at 1.

[52] *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."); *Blanca Telephone Co. v. FCC*, 743 F. 3d 860, 865 (D.C. Cir. 2014) (FCC has "obligation not to treat similarly situated carriers differently without offering an adequate explanation"); *Petroleum Communications, Inc. v. FCC*, 22 F. 3d 1164, 1172 (D.C. Cir. 1994) ("We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently.").

Respectfully submitted,

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January 26, 2015

CERTIFICATE OF SERVICE

I, Michael Beder, an associate with the law firm of Covington & Burling LLP, certify that on this 26th day of January, 2015, I caused copies of the foregoing "Opposition to Application for Review" to be served by electronic mail and by certified U.S. mail, return receipt requested, on the following:

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