



Federal Communications Commission
Washington, D.C. 20554

February 14, 2008

DA 08-367

In Reply Refer to:

1800B3-SS

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Mr. Rod Kovel
1368 Meadowbrook Road
Merrick, NY 11566

John W. Zucker, Esq.
New York AM Radio, LLC
77 W. 66th Street, 16th Floor
New York, NY 10023

Re: New York AM Radio, LLC
WEPN(AM), New York, NY
Facility ID No. 65636
File No. BR-20060201AJM

Application for Renewal of License

Petition for Reconsideration

Dear Mr. Kovel and Counsel:

We have before us a Petition for Reconsideration (the "Petition") filed by Rod Kovel ("Kovel") on July 27, 2006. The Petition seeks reconsideration of a May 26, 2006, staff action granting the captioned license renewal application (the "Application") of New York AM Radio, LLC, (the "Licensee") for Station WEPN(AM), New York, New York (the "Station").¹ For the reasons discussed below, the Petition is granted in part and denied in all other respects.

Background. On February 1, 2006, the Licensee filed the Application. As noted, the staff routinely granted the Application on May 26, 2006. On April 24, 2006, Kovel filed an Informal Objection ("Objection") to the Application. On July 27, 2006, Kovel filed his Petition arguing that his Objection was never considered by the staff in evaluating the Application.² Because the Objection was not brought to the attention of the processing staff prior to action on the Application, we grant the Petition to consider the arguments raised in the Objection which are reiterated in the Petition.³

¹ See *Broadcast Actions*, Public Notice, Report No. 46247 (rel. Jun. 1, 2006).

² In addition, Kovel filed a letter requesting action on his pending Objection and/or Petition. See *Letter to Office of the Secretary, Federal Communications Commission, from Rod Kovel*, filed on October 24, 2006.

³ Section 405 of the Communications Act of 1934, as amended (the "Act"), implemented by Section 1.106(b)(1) of the Commission's Rules (the "Rules"), requires that a person seeking reconsideration must have qualified as a "party" during the previous stages of the proceeding, or demonstrate that he or she is "aggrieved" or "adversely affected" by the decision; a "non-party" participating earlier in the proceeding as an informal objector is without standing to seek reconsideration. See, e.g., *Sagittarius Broadcasting Corp.*, Memorandum Opinion and Order, 18 (continued . . .)

Discussion. Pursuant to Section 309(e) of the Act, an 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.⁴ Specifically, Section 309(k) of the Act.⁵ provides that 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, we are to grant the renewal application.⁶ 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.”⁷

Kovel argues that the Commission should reconsider grant of the Station’s renewal application because the Station “does not serve the public interest.”⁸ Specifically, Kovel alleges the following: (1) the new owners changed the format of the Station to “all-sports” which duplicates the formats of other stations in the market;⁹ (2) the Station broadcasts minimal public interest programming except for a show that airs at 5:00 am Sunday mornings;¹⁰ (3) the Station “spends much of its free airtime referring listeners to programs on the cable networks;”¹¹ (4) repeated requests by Kovel to get the Station to improve its

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FCC Rcd 22551, 22553-54 (2003). However, because the staff did not consider Kovel’s Objection prior to grant of the Station’s renewal, we will accept and address the Petition on its merits. *See e.g., Barnes Enterprises, Inc.*, Memorandum Opinion and Order, 55 FCC2d 721 (1975) and *Max M. Leon, Inc.*, Memorandum Opinion and Order, 58 FCC2d 114 (1976) (Commission treats petition for reconsideration as an “informal” request upon determining that the parties were improperly denied a decision on the merits).

⁴ *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 note 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 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).

⁵ 47 U.S.C. § 309(k).

⁶ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described 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).

⁷ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

⁸ Petition at 1.

⁹ Petitioner attaches to the Petition a WEPN(AM) “Program Line-Up” printed from the Station’s website on October 19, 2006.

¹⁰ Kovel contends in his October 24, 2006, letter that this “public interest” program was taken off the air following grant of the Application.

¹¹ Petition at 1. Licensees must, of course, operate within the technical parameters of their authorizations. *See, e.g., 47 C.F.R. § 73.1350(a)*. Kovel presents no evidence that the Station is not operating as licensed.

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signal have been met with “utter indifference;” and (5) Kovel’s phone calls to the Station to request information about a specific “commercial” that aired were not returned.

With respect to the first three allegations made by Kovel, the role of the Commission in overseeing program content is limited. The First Amendment to the United States Constitution and Section 326 of the Act¹² prohibit the Commission from censoring program material or interfering with broadcasters’ free speech rights.¹³ The Commission does regulate broadcast content where federal statutes direct it to do so. For example, the Commission enforces the statutory prohibition on the broadcast of obscene, indecent and profane material contained in Section 1464 of the United States Criminal Code.¹⁴ However, the Commission will not take adverse action on a license renewal application based upon the subjective determination of a listener or group of listeners as to what constitutes appropriate programming.¹⁵ We grant licensees broad discretion to choose, in good faith, which issues are of concern to the community and to choose the best way to address those issues. The Commission will defer to the broadcaster’s judgment absent a showing that the broadcaster was “unreasonable or discriminatory in its selection of issues” or that the licensee has “offered such nominal levels of responsive programming as to have effectively defaulted on its obligation” to contribute to the discussion of issues facing its community.”¹⁶ In this case, Kovel has not met its burden to show that the licensees have abused their discretion.¹⁷ Kovel has not provided us with any detailed information regarding when he listens to the stations or what he considers to be issue-responsive programming. The Petitioner’s bare claims concerning the paucity of the Station’s local programming, including the program schedule printed from the Station’s website, fails to present a *prima facie* case of any violation of the Act or Rules or abuse of discretion in providing responsive programming by the Station in the relevant license term.

Moreover, because the First Amendment and the Act do not authorize the Commission to do so, the Commission does not oversee a licensee’s format selection. In 1977, the Commission issued a Policy Statement in which it concluded that review of program formats was not required by the Act, would not benefit the public, and would deter innovation, as well as impose substantial administrative burdens on the Commission.¹⁸ The Supreme Court of the United States has upheld this policy, stating that “the public interest is best served by promoting diversity in entertainment formats through market forces and

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¹² 47 U.S.C. § 326

¹³ U.S. CONST., Amend. I.; 47 U.S.C § 326.

¹⁴ 18 U.S.C. § 1464.

¹⁵ See *WGBH Educational Foundation*, Memorandum Opinion and Order, 69 FCC 2d 1250, 1251 (1978).

¹⁶ *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 *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (subsequent history omitted).

¹⁷ *Id.*

¹⁸ See *Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 FCC 2d 858 (1976); *Multicultural Radio Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 20630 (2000).

competition among broadcasters”¹⁹ Accordingly, on these issues, Kovel has not established a substantial or material question of fact to warrant further inquiry into Licensee’s basic qualifications to hold a Commission authorization during the subject license term.

Finally, with respect to Kovel’s allegations that the Station has not responded to his phone calls requesting information about an aired commercial or about Kovel’s alleged inability to receive the Station’s signal at night,²⁰ the Commission has essentially no role in overseeing a broadcast licensee’s “response time” to public inquiries and complaints. The Rules only require that the licensee’s main studio house a public inspection file, the contents of which must include “all written comments and suggestions received from the public regarding operation of a station”²¹ The Rules do not require the public inspection file to retain records of complaints received over the phone. Furthermore, the Rules do not require licensees to take affirmative steps to respond to each communication from the public or to respond within a fixed time period. The Rules only require that “[l]etters and electronic messages . . . be retained.”²² Licensees may, of course, take listener comments and complaints about station operations into account. Although they are not required to do so, we encourage licensees to respond promptly to all listener inquiries and complaints.²³ Accordingly, we find that on this issue Kovel has failed to show any violation by the Station of the Act, the Rules, or Commission policies.

Conclusion/Actions. For the above-stated reasons, the Petition for Reconsideration filed by Rod Kovel IS GRANTED to the extent indicated and IS DENIED in all other respects.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁹ See *WNCN Listeners Guild v. FCC*, 450 U.S. 582, 585 (1981); see also *Riverside Broadcasting Co., Inc.*, 53 RR 2d 1154, 1157 (1983), *recon denied*, 56 RR 2d 618 (1984), *remanded on other grounds sub nom., Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985), and *Letter to Jeff Kost and Marian Martinez*, 21 FCC Rcd 6223 (MB 2006).

²⁰ Petition at 1. Licensees must, as noted earlier, operate within the technical parameters of their authorizations. See, e.g., 47 C.F.R. §§ 73.1350(a), 73.1745. Kovel presents no evidence that the Station is not operating as authorized. His difficulties in receiving the Station at night may stem from the fact that the Station at the time was operating with reduced facilities pursuant to special temporary authorization (“STA”). See, e.g., *Letter to David N. Artim* (MB Mar. 21, 2007) (extending STA originally granted on November 30, 2004).

²¹ 47 C.F.R. § 73.3526(e)(9)(i).

²² See 47 C.F.R. § 73.3526(e)(9)(i) (letters and e-mail messages must be retained for a period of three years from the date on which they are received by the licensee).

²³ See, e.g., *Agape Broadcasting Foundation, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 9262 (MMB 1998) (forfeiture for indecent programming reduced in part because of licensee’s “prompt response” to listener complaint). The Commission may, however, consider a licensee’s failure to respond to numerous listener complaints in connection with an investigation into a licensee’s apparent lack of control and supervision over its broadcast facility or other licensee misconduct. See, e.g., *The Trustees of the University of Pennsylvania*, Decision, 69 FCC 2d 1394 (1978).