

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of

Application for Renewal of License    )  
WFOR-TV                                    )    BRCT-20041001AJQ  
Miami, FL                                    )

Application for Renewal of License    )  
WTVJ(TV)                                   )    BRCT-20041001ABM  
Miami, FL                                   )

**APPLICATION FOR REVIEW**

Pursuant to 47 CFR §1.115, the Office of Communication of the United Church of Christ, Inc. (“UCC”), respectfully submits this Application for Review of two letter decisions (collectively “Dismissal Letters”) in which the Chief, Video Division, Media Bureau (“Staff”), dismissed UCC’s December 9, 2004 *Petitions to Deny*. See *CBS Television Stations, Inc.*, DA 07-3532 (August 7, 2007); *NBC Telemundo License Co.*, DA 07-3533 (August 7, 2007). The *Petitions to Deny* challenged the license renewal of WFOR-TV (“WFOR”), Miami, FL and WTVJ(TV) (“WTVJ”), Miami, FL. This Application for Review warrants Commission action because the Staff’s decision is in conflict with the Communications Act.

The effect of these decisions is to remove Commission authority to examine network programming practices in the context of license renewal proceedings of network owned and operated stations. This impairs the Commission’s ability to administer its policies pertaining to indecency, children’s television, news staging, payola and other important matters.

As explained further below, the Staff action was beyond the scope of its delegated authority and erroneously concluded that the Communications Act bars UCC from challenging the license

renewals of WFOR and WTVJ. UCC asks that the Commission vacate the Staff action because it was *ultra vires* and incorrect as a matter of law, that the Commission consider the petitions to deny on their merits and grant the relief requested therein, and that the Commission grant all such other relief as may be just and proper.

## **I. THE MEDIA BUREAU DECISION.**

On December 9, 2004, UCC filed *Petitions to Deny* (“Petitions”) the license renewals of WFOR, which is licensed to CBS Television Stations, Inc. (“CBS”), and WTVJ, which is licensed to NBC Telemundo License Co.<sup>1</sup> (“NBC Telemundo”). UCC based its Petitions on the refusal of CBS and NBC Telemundo (collectively “Networks”) to carry an editorial advertisement for which UCC had sought network carriage. The advertisement was intended to reach those who have been alienated or felt rejected from the traditional church and society in general.

UCC had previously test marketed the advertisement on 11 stations, including five CBS affiliated stations and five NBC affiliated stations, none of which were owned and operated by CBS or NBC Telemundo. There were no clearance issues raised by any of the 11 licensees. However, UCC was informed that the Networks would not carry the advertisement. Based on the Networks refusal to carry the advertisement, WFOR’s relationship to CBS as an owned and operated station, and WTVJ’s relationship to NBC as an owned and operated station, UCC challenged the license renewals of WFOR and WTVJ (collectively “Stations”). UCC’s Petitions demonstrated that the Stations failure to present perspectives on the variety of ethically and value based expression in the United States and Miami market and refusal to sell time to UCC for the carriage of an advertisement

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<sup>1</sup>NBC Telemundo and NBC Television Network (“NBC”) are both owned by General Electric Company.

raised serious questions as to whether grant of the Stations' renewal applications were in the public interest.

Nonetheless, on August 7, 2007, the Staff denied UCC's Petitions. The Networks did not dispute, and the Staff did not question, UCC's standing. However, the Staff concluded that "[b]ecause UCC's allegations do not pertain to [the Stations]...UCC's petition is insufficient to make out a *prima facie* case." Dismissal Letters at 2. Although WFOR is owned and operated by CBS and WTVJ is owned and operated by NBC Telemundo, the Staff reasoned that, WFOR and WTVJ "may have chosen to air the spot had it been offered the opportunity." *Id.* The Staff further reasoned that "[u]nder the plain terms of section 309(k), the Commission cannot deny a license renewal application because the relevant findings must be made 'with respect to that station.'" *Id.* (citation omitted). Additionally, the Staff found that "'Congress...has expressly limited the scope of the license renewal inquiry to matters occurring at the particular station for which the license renewal is sought.'" *Id.*, citing *Sagittarius Broadcasting Corp.*, 18 FCCRcd 22551, 22555 (2003).

## **II. THE STAFF WAS REQUIRED TO REFER THIS MATTER TO THE ENTIRE COMMISSION.**

Generally, the Chief, Media Bureau is given broad authority to administer "the policy and licensing programs for the regulation of media," including the processing of renewal applications. 47 CFR §0.61. Despite this authority, the Staff is required to refer certain matters to the Commission. This includes "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedent and guidelines." 47 CFR §0.283. Such matters must be referred to the Commission *en banc*. As discussed below, *see infra* Sections II-IV, the Staff's interpretation of §309(k) goes beyond and is in conflict with prior precedent. Thus, the Staff was required to refer its decision to the Commission.

The Commission has never interpreted §309(k) to mean that networks are not accountable for their programming decisions as implemented by network owned and operated stations. The Staff's novel interpretation of Section 309(k) is not addressed by any existing Commission policy and was beyond the scope of delegated authority. Accordingly, the Commission must vacate the Staff's decisions and proceed to consider this issue and the merits of UCC's Petitions.

### **III. THE STAFF'S DECISION IS CONTRARY TO THE INTENT OF THE COMMUNICATIONS ACT.**

Eleven years after Congress amended Section 309 of the Communications Act, the Staff has, adopted a new and hitherto unimagined construction of the 1996 amendment to Section 309(k)(1). The Staff's Dismissal Letters are contrary to the plain language of Section 309(k)(1), which provides in pertinent part that

If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, *with respect to that station*, during the preceding term of its license-

(A) the station has served the public interest, convenience and necessity;...

(Emphasis added).

The facts of this case are that UCC attempted to purchase television advertisements on the Networks. In refusing to sell the airtime to UCC, the Networks were refusing to sell airtime on all the network stations, *including* WFOR and WTVJ. In challenging that refusal, UCC contends that the Networks were not operating their owned-and-operated stations, *including* WFOR and WTVJ in a manner compatible with "serv[ing] the public interest convenience and necessity...."

Thus, it is clear that UCC's allegation, if established at hearing, would preclude a finding "with respect to" WFOR and WTVJ, that those stations were being operated in "the public interest,

convenience and necessity.”

The WTVJ Staff decision<sup>2</sup> quotes Section 309(k) but does not discuss or explain its analysis of the plain language. Indeed, it concedes that the “NBC Network decides which ads to run as part of the network programming provided to owned-and-operated stations and other NBC affiliates....” *NBC Telemundo License Co.*, DA 07-3533 at 2. Instead of explaining why this fact does not control, the Staff decision points to the fact that “NBC stations also ‘sell advertising time locally and ultimately make their own judgments as to the acceptability of local spots.’ Station WTVJ(TV) may have chosen to air the spot if it had the opportunity.” *Id.* at 2 (footnote omitted).

That UCC might have, hypothetically, been able to purchase time for *local* carriage could have somewhat mitigated the harm that UCC experienced, but this does not mean that the Stations were being operated in the public interest. Leaving aside the cost and burden of attempting to purchase local spots, and the unlikelihood that local stations would adopt a different policy than their parent, this is no substitute for the ability and cost-effectiveness of a network buy. Much more importantly, it does not in any way change the fact that NBC, the licensee of WTVJ, and CBS, the licensee of WFOR, refused to sell airtime on their networks, including WTVJ and WFOR, and that it therefore was operating the station contrary to the public interest.

### **III. THE STAFF’S INTERPRETATION OF THE COMMUNICATIONS ACT IS ARBITRARY AND CAPRICIOUS.**

Even if the plain language of Section 309(k) were deemed ambiguous and thus did not control here, the Staff’s sudden discovery of a new construction of that provision is illogical, arbitrary and

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<sup>2</sup>The WFOR Staff decision analysis is essentially identical. For purposes of convenience, UCC here refers in the text only to the WTVJ Staff decision and NBC Telemundo, but the argument with respect to WFOR and CBS is the same.

capricious and must be rejected because it would deprive the Commission of its historic jurisdiction over the conduct of networks and group owners.

Broadcast networks are not licensed. The Commission has nonetheless examined - and regulated - the conduct of networks based on their status as licensees of so-called owned and operated stations. *See, e.g., Hunger in America*, 20 FCC2d 143 (1969). Thus, the Commission has repeatedly held that the conduct of network management officials “can fairly be attributed to its licensees. *Serafyn v. FCC*, 149 F.3d 1213, 1221 (D.C. Cir. 1998); *see also, Galloway v. FCC*, 778 F.2d 16 (D.C. Cir. 1985) (license challenge based on network programming).

The Commission’s practice of considering network practices in the context of their status as licensees has been considered and upheld by the Supreme Court of the United States. *CBS, Inc. v. FCC*, 453 US 367, 391 n. 14 (1981). In *CBS, Inc. v. FCC*, the Commission found that three networks had violated their public interest obligation to provide reasonable access to political candidates pursuant to 47 USC §312(a)(7). The networks claimed that Section 312(a)(7)’s reasonable access provision applied only to licensees who could have their licenses revoked by the Commission. *See CBS, Inc. v. FCC*, 629 F.2d 1, 25-26 (D.C. Cir. 1980), *aff’d*, *CBS, Inc. v. FCC*, 453 US at 392. The Court of Appeals rejected that contention and determined that the Commission’s jurisdiction “to mandate reasonable network access...is ‘reasonably ancillary’ to the effective enforcement of the individual licensee’s” public interest obligations. *CBS, Inc. v. FCC*, 629 F.2d at 26. The Court further reasoned that under relevant provisions of the Communications Act, the “Commission can regulate network practices that do not serve the ‘public interest, convenience, and necessity.’” *Id.* at 27. Plainly, then, a licensee’s obligation to serve the public interest does not rest solely with the individual station; the Commission also can ensure a licensee is serving the public interest by placing requirements

on the networks. In other words, the networks themselves can also control the manner in which the licensee does - or does not - serve the public interest.

It would be entirely illogical, and contrary to Commission precedent under the 1996 amendments to Section 309, to read Section 309(k)(1) as precluding review of network practices during license renewal proceedings involving owned and operated stations. Indeed, the Dismissal Letters would overturn decades of precedent and practice, leaving the Commission unable to address news staging, *see Hunger in America, supra*, Children's Television Act violations, *see Univision Communications, Inc.* 28 FCCRcd 5842 (2007), and indecency matters, *see National Broadcasting Co., Inc.*, 14 FCCRcd 9026 (1999), by examining network practices in the context of renewal. *See also, Howard Jaeckel*, 22 FCCRcd 11531 (2007) (letter of inquiry pertaining to allegedly indecent network programming in the context of petition to deny proceeding).

Moreover, there is a much more logical and practical reading of Section 309(k)(1) which comports with Commission policy since 1996. That is, the purpose of the 1996 amendment was to overrule the Commission's *Grayson Enterprises* and similar decisions, which established a policy that was the subject of great controversy and engendered great consternation on the part of many broadcasters. *See Grayson Enterprises, Inc.*, 77 FCC2d 936 (1980); *see also Commission Announces Modification of Grayson Enterprises Policy on Transferability of Broadcast Licenses*, 53 RR 2d 126 (1983).<sup>3</sup> Under these cases, the Commission examined the effect of misconduct at one group-owned station and determined whether the designation of that station's renewal application facility should

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<sup>3</sup>*See id.* ("If at [the time of designation] the alleged misconduct appears to affect the renewability of other licenses, they, too, will be set for hearing. As stated in *Grayson*, the basic issue involved in making that determination is 'whether there is a substantial likelihood that the allegations warranting designation of one station for hearing bear upon the operation of other stations.'").

also extend to the other commonly owned stations. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC2d 1179, 1223-25 (1986).

This reading of Section 309(k)(1) is far more logical, and much more in keeping with Commission and Congressional policy than that proffered by the staff. Thus, the Commission should vacate the Dismissal Letters and proceed to consider the merits of UCC's Petitions

#### **IV. THE STAFF'S RELIANCE ON COMMISSION PRECEDENT IS MISPLACED.**

The Staff's reliance on *Sagittarius Broadcasting Corp.*, 18 FCCRcd 22551, 22555 (2003) to conclude that, "[u]nder the plain terms of section 309(k)... 'Congress... has expressly limited the scope of the license renewal inquiry to matters occurring at the particular station for which the license renewal is sought,'" Dismissal Letters at 2, is misplaced. In *Sagittarius Broadcasting*, the Petitioner had challenged the license renewal of WXRK in New York, New York as a listener of KLSX in Los Angeles, California. Petitioner's challenge was based on indecent material that could potentially be heard on KLSX, which received WXRK's programming via satellite. The Commission dismissed the Petitioner's license renewal challenge based solely on procedural grounds.

The issue raised in that decision was solely that of the Petitioner's standing. Specifically, the Commission had to determine "whether a person has standing in a Commission proceeding to challenge the renewal of a distant station's license if he is a listener of a local station that broadcasts a version of the distant station's originally produced programming." *Sagittarius Broadcasting*, 18 FCCRcd at 22552. The Commission determined that the Petitioner had no standing to challenge the programming on the WXRK, because he was not an actual listener of WXRK and he did not become a listener of WXRK "or otherwise aggrieved by virtue of receiving local broadcasts of one of [WXRK's] programs. *Id.* It was only in this procedural context, to determine standing - where

Petitioner relied on the programming of KLSX to challenge the license of WXRK - the Commission determined that license renewal inquiries are to be based on the programming of the station in question.

The issue raised by the Staff's decisions regarding UCC's Petitions is inapposite to the issues raised by the Commission's decision in *Sagittarius Broadcasting*. Most obviously, there is no standing issue in the case of UCC's Petitions - UCC's members are actual viewers of WFOR and WTVJ, *see* Petitions at Attachment B, and neither WFOR nor WTVJ challenged UCC's standing. The decision in *Sagittarius Broadcasting* invoked Section 309(k) as limiting a party's standing to challenge a license renewal only in instances where a petitioner is privy to matters occurring at the station whose license the petitioner is challenging. Thus, the Staff's reliance on *Sagittarius Broadcasting* to suggest that Section 309(k) is intended to limit the scope of license renewal challenges to circumstances occurring at the particular station is misplaced.

The Staff's reliance on *Sagittarius Broadcasting* is also misplaced because, as discussed above, the Networks refusal to air the advertisement is effectively a refusal by WFOR and WTVJ to carry the advertisement. Moreover, the Staff incorrectly characterizes UCC's Petition to be "based on violations that occurred at other stations licensed to the same licensee." Dismissal Letters at 2. UCC's Petitions were not based on the decision of other licensees; rather UCC's Petitions were based on the decision of the Networks, which have the ability to mandate access by its licensees and to ensure those licenses are serving the public interest.

## **V. CONCLUSION.**

Not only was the Staff action was beyond the scope of its delegated authority, but the Staff erroneously concluded that the Communications Act bars UCC from challenging the license renewals

of WFOR and WTVJ based on the decisions of the Networks. UCC asks that the Commission vacate the Staff action because it was *ultra vires* and incorrect as a matter of law. The Commission must consider the Petitions on their merits and grant the relief requested therein grant all such other relief as may be just and proper.

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September 6, 2007