

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
ISOTHERMAL COMMUNITY) EB-00-IH-0414
COLLEGE) EB-00-IH-0504
) Facility #29262
Licensee of Noncommercial Educational Station)
WNCW(FM), Spindale, North Carolina)

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 2001

Released: December 6, 2001

By the Chief, Enforcement Bureau:

I. Introduction

1. In this Order, we admonish Isothermal Community College ("Isothermal"), licensee of noncommercial educational station WNCW(FM), Spindale, North Carolina, for broadcasting advertisements in violation of Section 399B of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. §399b, and Section 73.503 of the Commission's rules, 47 C.F.R. §73.503, and for failing to properly maintain its public file in violation of Section 73.3527 of the Commission's rules, 47 C.F.R. §73.3527.

2. We have carefully reviewed the record, including the complaints and Isothermal's responses, and conclude that the licensee has violated the pertinent statutory and Commission underwriting rule provisions, as well as the public file rule. While we believe that no monetary sanction is warranted at this time, we find that an admonishment is necessary to redress the statutory and rule violations. Moreover, we believe that it is appropriate to specifically advise Isothermal of our concerns so that rule compliance may be fully achieved.

II. Background

3. In response to an initial complaint filed December 12, 2000, by station listener Bill Bost, we investigated Isothermal's broadcast of announcements regarding "The WNCW Mountain Oasis Music Festival," a local concert event which was conducted by a for-profit enterprise, A.C. Entertainment of Knoxville ("ACE"), as well as questions concerning the station's maintenance of its public file.1 Isothermal responded to our January 26, 2001, and March 30, 2001, inquiries by submissions dated February 15, 2001 and April 19, 2001. After having received a further public file complaint submitted August 15, 2001, by Ted Bost, we inquired by letter of August 20, 2001, to which Isothermal responded by letter dated September 6, 2001.

1 On September 18, 2001, Bill Bost further alleged that the licensee wrongfully denied his station listener membership renewal in reprisal for his complaint to the FCC. Their dispute on this point appears to be a private matter. As such, Mr. Bost's later complaint does not raise issues within the scope of the licensee's public interest obligations, and we will not address it.

III. Discussion

4. *Underwriting Announcements.* Advertisements are defined by the Act as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of for-profit entities. 47 U.S.C. §399b(a); 47 C.F.R. §73.503. Noncommercial educational stations may not broadcast advertisements. Although contributors of funds to noncommercial stations may receive on-air acknowledgements, the Commission has held that such acknowledgements may be made for identification purposes only, and should not promote the contributors' products, services, or business. The Commission noted that it may be difficult at times for licensees to distinguish between language that promotes versus that which merely identifies the underwriter, but expects that licensees exercise "reasonable, good faith judgment" in this area. *See Xavier University*, 5 FCC Rcd 4920 (1990); *Public Notice*, "In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," (April 11, 1986), *republished*, 7 FCC Rcd 827 (1992).

5. As noted above, under Section 399B of the Act, noncommercial broadcasters are generally prohibited from broadcasting messages that promote the products, services or businesses of for-profit entities, if made in exchange for remuneration. However, where "economic consideration" is not the basis for the broadcast of particular announcements, noncommercial stations may broadcast messages promoting local "transitory events," such as movies, plays, concerts, etc., including ticket prices and information, so that listeners may be informed as to local happenings. In this case, complainant Bill Bost claims that the station broadcast announcements in October, 2000, promoting a for-profit concert event, "The WNCW Mountain Oasis Music Festival," transcripts of which are attached. Mr. Bost contends that the music festival was not the station's own event, but was jointly sponsored with ACE, and thus served to impermissibly benefit a for-profit entity.

6. Isothermal does not deny that it broadcast the announcements in question, but argues that their broadcast did not violate Section 399B of the Act. In this regard, the licensee contends that the announcements were aired to publicize "The WNCW Mountain Oasis Music Festival" consistent with its discretion under Commission precedent to promote local "transitory events" in the station's community. Isothermal represents that ACE produced the festival and realized all of its financial proceeds, and that the station lent its name, or "sponsored" the festival, and received event tickets and publicity in exchange for that and for airing promotional announcements.² Isothermal argues that the announcements were permissible because the event tickets it received did not constitute cognizable remuneration and because it did not receive any of the proceeds resulting from the music festival. Isothermal describes ACE as a "long-time supporter" of the station, and emphasizes that ACE's "role as an underwriter was entirely separate and apart from its role as a producer" of the music festival. Isothermal claims that the purpose for its "sponsorship and promotion of the WNCW Festival was the ability to promote the value of membership in Station WNCW and to encourage listeners to become members," and is consistent with the type of "creative fundraising" encouraged by the Commission in *Chicago Educational Television Association (WTTW(TV))* (MMB October 23, 1995).

7. We reject Isothermal's contention that the broadcast of the instant announcements was consistent with the Commission's "transitory event" exception. In the

² See Isothermal's April 19, 2001 and February 15, 2001, responses to the staff's letters of inquiry dated March 30, 2001 and January 26, 2001, respectively.

Memorandum Opinion and Order, “In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations,” 90 FCC 2d 895, 911 (1982), the Commission specifically warned licensees that “a public broadcaster’s decision to promote third parties must be based on public-spirited determinations rather than economic considerations.” In this case, the licensee admits that it received “event tickets” in specific exchange for broadcasting announcements promoting a music festival that directly benefited ACE, a for-profit entity, and that they were not given as general underwriting support.³

8. Isothermal seems also to imply that the tickets were not “consideration received” by the station because they were thereafter used as donor premiums or listener giveaway prizes and not retained. However, it ignores that “remuneration” and “consideration” have been construed to include various forms. *See, e.g., Fuqua Communications, Inc.*, 30 FCC 2d 94, 97 (1971) (consideration may be found where “trade-out” or barter are exchanged); *Window to the World Communications, Inc.*, 12 FCC Rcd 20239, 20241 (MMB 1997), *affirmed in part, modified in part*, 15 FCC Rcd 10025 (EB 2000) (consideration may be found where the programming itself is provided freely or at reduced cost). Thus, to the extent that Isothermal argues that it received no remuneration for broadcasting the music festival announcements, its acceptance of event tickets that were later used as promotional giveaways and donor premiums belies that claim.

9. Moreover, even if Isothermal had not received tangible consideration in the form of event tickets from ACE in exchange for making the broadcast announcements in which that business was promoted, we could not ignore that the announcements themselves appeared to support the station’s self-interest by identifying the event as the “The WNCW Mountain Oasis Music Festival.” Thus, the station clearly anticipated increased membership, and enhanced economic benefit, as a result of its broadcast promotion of the music festival directly benefiting a for-profit entity, ACE. Consistent with the *Memorandum Opinion and Order, supra*, we do not believe that the “transitory event” exception was intended to apply to announcements of this type, made out of a station’s self-interest rather than its “public-spirited determination.” *See also Letter of the Chief, Investigations and Hearings Division to University of Massachusetts (WFCR(FM))* (February 29, 2000).

10. Finally, we strongly disagree with Isothermal’s reliance on *Chicago Educational Television Association (WTTW(TV))*, *supra*, to justify the promotional underwriting announcements in this case. In *Chicago*, the Mass Media Bureau criticized, but declined to punish, the conduct of a joint-fundraising arrangement where the noncommercial station split its fundraising proceeds with other area not-for-profit institutions. As noted above, in this case the licensee’s promotion of the music festival at issue directly benefited ACE, a for-profit entity, and the harm caused to the noncommercial service was far more tangible. Consequently, we find that Isothermal violated Section 399B of the Act through airing the announcements in question.

11. *Public Inspection File*. In his December 12th complaint, Bill Bost further alleged that the licensee withheld certain documents he requested that relate to the station’s promotion of “The Mountain Oasis Music Festival,” discussed above, and that it suddenly raised the documents’

³ In its February 15, 2001, response, Isothermal indicates that in exchange for its agreement to air the announcements promoting the event:

“[t]he station received a donation of event tickets for its fall fund drive (as it had for previous fund-raising events). These tickets were used as station premiums for fund-raising and as giveaway items for self-promotion purposes Announcements for the event were included in WNCW’s community concert calendar, a determination made solely by the station.”

copying cost without justification, in order to discourage his investigation. Bill Bost claims that, during his October 3, 2000, visit, the station's public file lacked specific documents that are required to be contained therein pursuant to Subsections 73.3527 (e)(4), (5), (6), (9), and (10). In his August 15th complaint, Ted Bost alleged that on August 10, 2001, WNCW(FM) staffers unreasonably delayed his access to the station's public file.⁴ In sum, Messrs. Bost charge that Isothermal violated Section 73.3527 of the Commission's rules, and should be sanctioned accordingly.

12. In its February 15th and April 19th responses, Isothermal admits only that it failed to include materials in its public file relating to its quarterly issues/programs and donors lists, as required by Subsections 73.3527(e)(8) and (9) of the Commission's rules, but avers that it has since taken remedial action. The licensee denies, however, Bill Bost's allegation that it overcharged him for copying services or that it discouraged his investigation. Isothermal explains that the extensive nature of Bill Bost's document production request, which appears to have sought material beyond the scope of the station's public file rule,⁵ required it to hire additional clerical help and raise its per page copying fee from 10 to 25 cents. Moreover, in its response to our subsequent August 30th inquiry, Isothermal denies that it improperly delayed access to Ted Bost when he requested to inspect the public file on August 10, 2001. The licensee claims that due to Mr. Bost's earlier threats of litigation and apparent antagonism toward the staff, the station's managers feared that a safety issue might arise during his visit. Isothermal represents that the station's staff thus delayed Mr. Bost's access to the public file approximately ten minutes while it sought assistance from the university's legal counsel and security department to monitor the visit. Isothermal argues that, given the full circumstances of Mr. Bost's visit, such delay was not unreasonable and was consistent with the intent of Section 73.3527 of the Commission's rules.

13. Section 73.3527(a) of the Commission's rules requires noncommercial broadcast licensees to maintain a public file containing specific types of information related to station operations.⁶ The purpose of this requirement is to provide the public with timely information at

⁴ In his September 26th reply, Ted Bost indicated that he was "delayed 24 minutes" in his attempt to view the public file on August 10th. Although his complaint suggests he was delayed or denied access to the station's public file on July 2nd, in his reply he also acknowledged that he did not actually request to view the file at that earlier time. Mr. Bost indicates that he instead used that visit to seek financial records pertaining to his state FOIA request.

⁵ According to the licensee, pursuant to a North Carolina state Freedom of Information Act ("FOIA") request, Ted Bost also sought non-FCC regulated information relating to the station's operations, including current and prior year invoices and employee expense reports.

⁶ Among the items that are required to be contained in the public file are: copies of all current FCC authorizations and modifications thereto (47 C.F.R. § 73.3527(e)(1)); copies of the station's FCC applications (47 C.F.R. § 73.3527(e)(2)); the station's contour maps (47 C.F.R. § 73.3527(e)(3)); the station's annual ownership reports and related materials (47 C.F.R. § 73.3527(e)(4)); such records as are required to be kept concerning broadcasts by candidates for public office (47 C.F.R. § 73.3527(e)(5)); a copy of the manual entitled "The Public and Broadcasting" (47 C.F.R. § 73.3527(e)(7)); a quarterly list of programs that have provided the station's most significant treatment of community issues (47 C.F.R. § 73.3527(e)(8)); a list of donors supporting specific programs (47 C.F.R. § 73.3527(e)(9)); a statement certifying that required local public notice announcements were made at the time of both the pre-filing and post-filing of the license renewal application, and the text of such announcements (47 C.F.R. § 73.3527(e)(10)); material having a substantial bearing on a matter which is the subject of an FCC investigation or complaint to the FCC about which the licensee has been advised (47 C.F.R. § 73.3527(e)(11)); and, where applicable, "must-carry" requests (47 C.F.R. § 73.3527(e)(12)).

regular intervals throughout the license period, so that concerned individuals or groups may participate effectively in Commission proceedings concerning a broadcast licensee, including the evaluation of its performance. *See, e.g., Liability of KLDL-TV 55, Inc.*, 8 FCC Rcd 6316 (1993) *forfeiture reduced*, 10 FCC Rcd 3198 (1995). The file must be available to the public at any time during the licensee's regular business hours. *Id.*; *Public Notice*, "Availability of Locally Maintained Records for Inspection by Members of the Public," 13 FCC Rcd 17959 (1998), *citing WBRN, Inc.*, 32 FCC 2d 729 (1971); *Morton L. Berfield, Esq.*, 71 RR 2d 142 (FOB 1992) (the file must be *immediately* available for inspection by members of the public, not through appointments or at times most convenient to the licensee). Moreover, Section 73.3527(c) of the Commission's rules requires that requests for copies of documents required to be kept in the station's public file be fulfilled by the licensee at a reasonable cost and within a reasonable period of time, *i.e.*, not more than seven days.

14. Isothermal admits that its station's public file was deficient at the time of our January 26th inquiry with respect to its quarterly issues/programs and donors lists, contrary to the requirements of Subsections 73.3527(e)(8) and (9) of the Commission's rules. The licensee avers that it has since taken remedial action, and denies the complainants' allegations that the public file was deficient in other respects. In its response to our query, Isothermal provides information indicating that the materials required by the rule's other subsections are, in fact, included in its public file and are current. We note that the complainants have not provided any probative evidence to rebut the licensee's account concerning that showing. Moreover, we accept Isothermal's explanation that it raised its copying fees reasonably in order to recoup its overall copying costs, including clerical expense, in a manner consistent with the Commission's public file rule.

15. Finally, while it is a matter of concern when we receive a complaint that a licensee has delayed in responding to a request to view its station's public file, we recognize that noncommercial licensees that are also educational institutions have legitimate security considerations which may require them to take precautionary steps that delay their visitors access to the stations' files. *See Letter from the Chief, Investigations and Hearings Division, to Carmel/Clay School Corporation (WHJE(FM))* (March 15, 2001). In this case, Ted Bost's delay was fairly insubstantial, less than half an hour, and was apparently caused by the licensee's apprehension that security precautions were necessary. We have no reason to question the licensee's judgment regarding that concern. Consequently, we find that Isothermal violated Section 73.3527(e) (8) and (9) of the Commission's rules only and find no merit to the complainants' further allegations concerning this issue.

16. In view of the foregoing, we find that Isothermal violated Section 399B of the Act, and Sections 73.503 and 73.3527 of the Commission's rules, respectively, by broadcasting announcements promoting a for-profit entity and for failing to maintain the station's public file. In light of the station's otherwise unblemished prior enforcement record, however, we find that a monetary sanction is not warranted to redress this rule violation. *See Note to Section 1.80 (b)(4) of the Commission's rules.*⁷ Instead, we believe that an admonishment is appropriate under the circumstances of this case.

⁷ 47 C.F.R. § 1.80(b)(4).

IV. Ordering Clauses

17. In view of the foregoing, we conclude that a sanction is appropriate. Accordingly, IT IS ORDERED that Isothermal Community College, licensee of noncommercial educational station WNCW(FM), Spindale, North Carolina, IS ADMONISHED for broadcasting advertisements in violation of Section 399B of the Act, 47 U.S.C. §399B, and Sections 73.503 and for failing to maintain properly its station's public file in violation of 73.3527 of the Commission's rules, 47 C.F.R. §§73.503 and 73.3527.

18. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order shall be sent, by Certified Mail -- Return Receipt Requested, to Robert Woods, Esq. and Steven C. Schaffer, Esq., of Schwartz, Woods & Miller, Counsel for Isothermal Community College, 1350 Connecticut Avenue, N.W., Suite 300, Washington, D.C. 20036-1717.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

Attachment

Promo # 1

Between the traffic, the shopping malls and the bad music videos does it ever feel like we're all just:

[MUSIC - Living in the wasteland of the free]

Maybe we all just need:

[MUSIC - more love]

And better music. WNCW's Mountain Oasis Music Festival is-an escape from the ordinary with performances from Bela Fleck, Iris DeMent, Tim O'Brien and Darrell Scott, Leftover Salmon, Corey Harris, Robert Earl Keen, Southern Culture on the Skids, Peter Rowan and Tony Rice, John Cowan and many more including a second lakeside stage. The Weekend of October 6th, 7th, and 8th, it's the WNCW Mountain Oasis Music Festival at Deerfields near Hendersonville, North Carolina. Camping is also available and tickets are on sale now at 877-995-9961 and at concertwire.com. WNCW celebrating live music with the people who love it.

[MUSIC - Way up on the hill where they do the boogie, do the boogie, do the boogie, oh I wonder what they do when they do the boogie ... do do do do do do]

PROMO- Friday

WNCW's Mountain Oasis Music Festival will feature three days of the music you hear and love on your favorite public radio station. The Festival will take place Friday, Saturday, and Sunday, October 6th, 7th, and 8th at Deerfields near Hendersonville, North Carolina. Friday's lineup begins at 7 pm with the Donna the Buffalo, followed by David Gans, host of the Grateful Dead Hour, and finishes up with the Dark Star Orchestra. Wireless support and accessibility provided by Verizon Wireless. Visit our website at WNCW.org for more information or visit concertwire.com for tickets to WNCW's Mountain Oasis Music Festival.

PROMO - Saturday

WNCW's Mountain Oasis Music Festival will feature three days of the music you hear and love on your favorite public radio station. The festival will take place Friday, Saturday and Sunday, October 6th, 7th and 8th at Deerfields near Hendersonville, North Carolina. Saturday's line-up begins with Tim O'Brien and Darrell Scott, Iris DeMent, Corey Harris and Dan Hicks and the Hot Licks. The music continues into the evening with Southern Culture on the Skids, Robert Earl Keen, Leftover Salmon and Bela Fleck and the Flecktones. Visit our website at WNCW.org for more information or visit concertwire.com for tickets to WNCW's Mountain Oasis Music Festival.

