



Federal Communications Commission
Washington, D.C. 20554

November 3, 2005

DA 05-2897
In Reply Refer to:
1800B3-ALV

Dan J. Alpert, Esq.
Law Offices of Dan J. Alpert
2120 N. 21st Road
Arlington, VA 22201

Re: KFLO-LP, Jonesboro, Arkansas
Facility ID No. 134653
File No. BLL-20040412AAH
American Heritage Media, Inc.

Application for Station License

Dear Mr. Alpert:

We have before us the captioned application of American Heritage Media, Inc. (“American Heritage”) for a license for low power FM (“LPFM”) station KFLO-LP, Jonesboro, Arkansas. We also have before us an Informal Objection and Request to Revoke Construction Permit (“Objection”), filed May 12, 2004, by Saga Communications of Arkansas, LLC (“Saga”).¹ For the reasons stated below, we grant the Objection to the limited extent indicated, admonish American Heritage for broadcasting advertisements in violation of Section 399B of the Communications Act of 1934, as amended (the “Act”),² and Section 73.503(d) of the Commission’s rules, and grant the license application.³

Background

Low power FM stations, such as KFLO-LP, are governed by the rules pertaining to the noncommercial educational service, and may not broadcast advertisements.⁴ 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.⁵ Although contributors of funds to noncommercial stations may receive on-air acknowledgments, the Commission has unequivocally stated that such acknowledgments may be made for identification purposes only, and should not promote the contributors’ products, services, or business.⁶ Specifically, such announcements may not contain comparative or

¹ American Heritage filed an Opposition to the Objection on June 9, 2004.

² 47 U.S.C. § 399b.

³ 47 C.F.R. § 73.503(d).

⁴ See 47 C.F.R. § 73.801 (applying Section 73.503 of the Commission’s rules to LPFM stations); see also 47 U.S.C. § 399b(a).

⁵ 47 U.S.C. § 399b(a).

⁶ See *In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, Public Notice (1986), *republished*, 7 FCC Rcd 827 (1992).

qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent, or lease.⁷ At the same time, however, the Commission has acknowledged that it is at times difficult to distinguish between language that promotes versus that which merely identifies the underwriter. Consequently, it expects only that broadcasters exercise reasonable, “good faith” judgment in this area.⁸

Saga asserts that American Heritage is broadcasting commercial announcements in violation of the pertinent statutory and Commission underwriting rule provisions. Specifically, Saga provides evidence of several announcements allegedly broadcast by KFLO-LP on April 26, 2004, and May 3, 2004, which, Saga avers, exceed the bounds of what is permissible under Section 399B of the Act. Further, Saga contends that American Heritage apparently misrepresented the educational purpose for which it would use the LPFM station and is operating KFLO-LP as a commercial radio station. Accordingly, in light of these alleged violations, Saga urges us to deny the license application or designate it for hearing and revoke the KFLO-LP construction permit.

American Heritage acknowledges that it broadcast the subject announcements over KFLO-LP, but maintains that, with the exception of the announcement broadcast on behalf of S&T Food Outlet (“S&T”), the announcements comply with the pertinent Commission underwriting guidelines. Specifically, American Heritage explains that prior to commencing operations, it reviewed the Commission’s underwriting rules, was careful not to allow the inclusion of price information, calls to action, or comparative or qualitative descriptions in its announcements, and accordingly, believed that its underwriting announcements were appropriate for broadcast. After receiving Saga’s complaint, American Heritage states that it immediately suspended and analyzed each underwriting announcement to ensure the language conformed with the Commission’s underwriting policies. Although American Heritage acknowledges that the S&T announcement arguably exceeded the Commission’s underwriting guidelines, it explains that it no longer allows phrases which may imply quality or price comparisons in its announcements.⁹ Finally, American Heritage states that it has taken steps to ensure future compliance and keep abreast of the Commission’s underwriting rules.¹⁰

Discussion

Saga’s Objection to American Heritage’s license application must be judged under the stringent standard of Section 319(c) of the Act.¹¹ Specifically, under Section 319(c), American Heritage is entitled to a high degree of protection and a presumption that the Section 309(e)¹² public interest determination made during the construction permit proceeding continues in effect.¹³ We granted American Heritage’s LPFM permit application based on our conclusion under Section 309 that the public interest would be served by operation of KFLO-LP. This finding was based on the evidence submitted by American Heritage in support of its request, and was unchallenged. Under Section 319(c), American Heritage now

⁷ *Id.*

⁸ See *Xavier University*, Memorandum Opinion and Order, 5 FCC Rcd 4920 (1990) (“*Xavier*”).

⁹ American Heritage concedes that the statements that S&T accepts food vouchers and “you’ll be surprised by the quality and price on meats...” arguably imply that S&T’s quality and price is better than other similar businesses.

¹⁰ American Heritage states that it is a member of the National Federation of Community Broadcasters, which publishes a guide to underwriting, and subscribes to “LPFM News.”

¹¹ 47 U.S.C. § 319(c).

¹² 47 U.S.C. § 309(e). Under Section 309(e) the applicant has the burden of proving to the Commission that the public interest would be served by grant of the application.

¹³ See *Focus Cable of Oakland, Inc.*, 65 F.C.C.2d 35, 39-40 (1977).

has a protected interest in the grant of its license application,¹⁴ and we are mandated to grant the license unless “extraordinary circumstances”¹⁵ have arisen, since grant of the permit, which would make the operation of the station against the public interest. Under this standard, Saga’s challenge fails.

Broadcast of Commercial Announcements. We have reviewed the transcript provided by Saga and find that the majority of the subject announcements merely identify, but do not promote, their for-profit sponsors, and are thus in accord with the Commission’s underwriting policies. Specifically, the announcements briefly describe their underwriters’ products or services in generic, value-neutral terms, and list business addresses and telephone numbers, consistent with the identification-only purpose of underwriting announcements.¹⁶

We find, however, that the April 26, 2004, underwriting announcements, aired on behalf of S&T, C.J. Watkins Construction Company, and Echoquest, exceed the bounds of what is permissible under Section 399B of the Act, and the Commission’s pertinent rules and policies, in light of the “good faith” discretion afforded under *Xavier*.¹⁷ Specifically, these announcements contain promotional references that encourage or invite business patronage, make prohibited price references, or otherwise depict the underwriter in a comparative and qualitative manner, and are thus prohibited.

Specifically, the S&T announcement, which American Heritage concedes was promotional, contains a prohibited price and qualitative description as well as a call to action.¹⁸ The C.J. Watkins Construction Company announcement impermissibly induces patronage of the underwriter’s business by advertising that “all completed work comes with a full warranty.”¹⁹ Finally, the Echoquest announcement extols the “The Fresh Air” as an “advanced air system” which utilizes “state-of-the-art technology to create a more efficient way to keep you free of smoke and odor.” This characterization of the product is not value-neutral, but rather casts the product in a favorable light, distinguishes it from its competitors through comparative and qualitative terms, and thus impermissibly promotes the for-profit underwriter.²⁰ We find that the foregoing announcements otherwise exceed the “good faith” discretion afforded licensees under *Xavier*.

Misrepresentation. According to Saga, the alleged transgressions warrant denial of the KFLO-LP license application and revocation of the construction permit because, Saga asserts, they are evidence that

¹⁴ The Commission has considered grant of license applications to follow almost automatically from issuance of the construction permit and construction of the station thereto. *See, e.g., Meyer Broadcasting Company*, 65 F.C.C.2d 438, 441 (1977).

¹⁵ *Whidbey Broadcasting Services, Inc.*, 4 FCC Rcd 8726, 8727 (1989). Circumstances which may have constituted sufficient bases for lodging valid objections against a particular permit application may not be sufficient to justify designating the license application for hearing. *See, e.g., KACY, Inc.*, 30 F.C.C.2d 648 (1971).

¹⁶ *See, e.g., Family Vision Ministries*, 18 FCC Rcd 1418 (2003).

¹⁷ The subject underwriting announcements are transcribed in the Attachment hereto.

¹⁸ The announcement induces patronage by advertising that “[y]ou’ll be surprised by the quality and price on meats ... making it worth the drive to Trumann.” *See* Attachment.

¹⁹ *See Penfold Communications*, 13 FCC Rcd 23731 (1998) (finding that an announcement advertising that an underwriter’s “work carries a one-year warranty” impermissibly promotes the underwriter and provides an inducement to frequent the underwriter’s establishment) (“*Penfold Communications*”).

²⁰ *See, e.g., Penfold Communications* (references advertising to general usefulness, convenience or advantages of products or services are promotional); *Radio Station WBHL*, 7 FCC Rcd 5123 (1992) (descriptions such as “reliable,” “excellent,” and “dependable” are qualitative).

American Heritage is “blatantly and illegally broadcasting commercial announcements” and therefore misrepresented the commercial nature of the programs it intended to broadcast.²¹ We reject these allegations and Saga’s proposed dire sanction.

Misrepresentation is a false statement of fact made with intent to deceive the Commission.²² There is no evidence that American Heritage misrepresented its intention to operate a noncommercial station in its initial LPFM application and is now intentionally deceiving the Commission by, as Saga avers, operating as a “commercial broadcaster, under the guise of operating a noncommercial educational LPFM station.”²³ Rather, American Heritage states that it legitimately operates KFLO-LP as a noncommercial educational LPFM station. Additionally, American Heritage declares, under penalty of perjury, that: (1) it reviewed the Commission’s underwriting guidelines prior to commencing operations and believed its announcements complied with the Commission’s rules; (2) after receiving Saga’s objection, it immediately suspended and reviewed all underwriting announcements to further ensure its announcements did not exceed the FCC’s guidelines; and (3) it has taken steps to ensure future compliance.²⁴ Saga has provided insufficient evidence to support a conclusion that American Heritage operated KFLO-LP as a commercial station.

In view of the foregoing, we find that American Heritage’s isolated violations of the Commission’s underwriting rules do not warrant denial of the KFLO-LP license application, revocation of the KFLO-LP construction permit, or even a monetary forfeiture.²⁵ We instead conclude that an admonishment is sufficient to redress the instant statutory and rule violations. Finally, we urge American Heritage to continue to review the Commission’s underwriting rules and policies, examine its internal procedures and practices, and use care to ensure future compliance.

Conclusion

Based on the evidence presented in the record, we find that Saga has not raised a substantial and material question of fact warranting further inquiry or denial of the subject application. We further find that American Heritage Media, Inc. is qualified as a Commission licensee and that grant of the KFLO-LP license application is consistent with the public interest, convenience, and necessity. Accordingly, IT IS ORDERED that American Heritage Media, Inc. IS ADMONISHED for broadcasting advertisements in violation of Section 399B of the Act, 47 U.S.C. § 399b, and Section 73.503(d) of the Commission’s rules, 47 C.F.R. § 73.503. IT IS FURTHER ORDERED that the May 12, 2004, Objection filed by Saga Communications of Arkansas, LLC IS GRANTED to the extent indicated herein and IS DENIED in all other respects, and the KFLO-LP license application (File No. BLL-20040412AAH) IS GRANTED.

²¹ Saga Objection at 6.

²² *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 129 (1983).

²³ Saga Objection at 6.

²⁴ See American Heritage Opposition at Exhibit A (Declaration of John J. Shields, President of American Heritage).

²⁵ *Compare Christian Voice of Central Ohio*, 19 FCC Rcd 23663 (2004) (assessing a \$20,000 forfeiture against a licensee for willfully and repeatedly broadcasting multiple prohibited advertisements over a fifteen-month period), *response pending*. Although we find that a monetary sanction is not necessary to redress the instant statutory and rule violations, we note that because these violations occurred more than one year prior to today’s date, we are also statutorily barred from issuing a forfeiture. See 47 U.S.C. § 503(b)(6)(B) (providing that a forfeiture cannot be imposed on a person not holding a broadcast station license “if the violation charged occurred more than 1 year prior to the date of issuance of the required notice.”); see also, e.g., *Manahawkin Communications*, 17 FCC Rcd 242, 255 (2001); *California State University at Sacramento*, 14 FCC Rcd 10018 (1999).

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Gary S. Smithwick, Esq.

Attachment

April 26, 2004

S&T Food Outlet

S&T is open to the public, and they now accept food vouchers. You'll be surprised by the quality and price on meats, such as pork chops, fish, hot wings, and all cuts of chicken, vegetables, and appetizers, like pepper poppers, cheese sticks, mushrooms and corn nuggets, making it worth the drive to Trumann. S&T Food Outlet, inside Couch's Barbecue, at 405 Highway 463 South in Trumann. Proud to underwrite gospel programming and information on 102.9 FM KFLO.

C.J. Watkins Construction Company

C.J. Watkins Construction Company services families throughout Northeast Arkansas and Southeast Missouri with custom windows, doors and siding, enclosures, carports and complete remodeling. All completed work comes with a full warranty. C.J. Watkins Construction Company has a toll free number. That number is 1-877-259-2854. C.J. Watkins Construction Company.

Echoquest

Echoquest introduces The Fresh Air, an advanced air system that will eliminate smoke and odor. The Fresh Air combines natural environmental processes with state-of-the-art technology to create a more efficient way to keep you free of smoke and odor. The Fresh Air can also be used to kill mold, mildew, and bacteria. Fresh Air independent distributor John Neal would like to offer more information. John Neal, independent distributor for The Fresh Air by Echoquest. The toll free number is 1-888-309-2173. That's 1-888-309-2173, or 870-258-4173 for a bundle of Fresh Air, by Echoquest.