



Federal Communications Commission
Washington, D.C. 20554

DA 07-3084
Released: July 10, 2007

Kenneth C. Howard, Jr., Esquire
Baker & Hostetler LLP
Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5304

Mr. Michael Greiner
Financial Law Group, PC
12000 Lutz
Warren, Michigan 48093

Re: Application for Renewal of License
WXYZ-TV, Detroit, Michigan
File No. BRCT-20050601AIB
Facility ID No. 10267

Gentlemen:

On August 16, 2005, Mr. Michael Greiner filed a Petition to Deny the above-referenced license renewal application of Channel 7 of Detroit, Inc. ("Channel 7"), licensee of station WXYZ-TV, Detroit, Michigan. On September 15, 2005, Channel 7 filed its Opposition. For the reasons set forth below, we deny the Petition to Deny.

Background. Mr. Greiner, former Deputy Mayor of Warren, Michigan, argues that granting the renewal application would disserve the public interest because two station WXYZ-TV investigative reports violated the Commission's news distortion policy. He contends that the first story, entitled "Michigan Boys," alleged that several prominent local business persons and one local official consorted with prostitutes during a fishing trip to Costa Rica. Mr. Greiner claims that Mr. Steve Wilson, Chief Investigative Reporter for station WXYZ-TV, paid prostitutes to appear at the hotel at which the trip's participants were staying, then falsely reported that the participants consorted with the prostitutes.

The second investigative report was critical of TV-Warren, a local cable television public access channel run by the Warren, Michigan city government. Mr. Greiner claims that station WXYZ-TV aired the story in retaliation for a previous TV-Warren story critical of Mr. Wilson's reporting of the "Michigan Boys" story. As evidence, he alleges that Mr. Wilson contacted a member of the TV-Warren news staff and stated that he would investigate TV-Warren if the station went ahead with the story criticizing his reporting. Mr. Greiner additionally complains that WXYZ-TV's promotional spots for the story falsely asserted that taxpayers fund TV-Warren, and that this represents a reckless disregard for the truth. In addition to the news distortion allegations, Mr. Greiner argues that Channel 7 engaged in misrepresentation when it

did not disclose the news distortion allegations in its response to Section II, item 2(b) of the renewal application for station WXYZ-TV.

Channel 7 denies that Mr. Wilson paid for or otherwise arranged for the prostitutes referred to in the “Michigan Boys” story to appear, and has supported this assertion with separate declarations from both Mr. Wilson and Roman Rosario, the photographer that accompanied him on the trip. In a separate Declaration, Grace Gilchrist, Station Manager of station WXYZ-TV, states that the story did not allege that any of the trip’s participants engaged the services of prostitutes, but did question the propriety of public officials attending an event during which there was substantial interaction with prostitutes. Channel 7 further states that “even assuming *arguendo* that Mr. Greiner’s allegations with regard to Mr. Wilson were sufficiently supported, Mr. Greiner puts forth absolutely no extrinsic evidence that WXYZ-TV, its principals, top management or news management were involved in any news distortion.”¹

Channel 7 argues in its Opposition that Mr. Greiner has provided no evidence that station WXYZ-TV aired the TV-Warren story as retaliation for the cable channel’s critical coverage of Mr. Wilson’s reporting. Channel 7 states that the story was rather the result of the Warren Mayor’s decision to halt rebroadcasts of city council meetings, a story which had already garnered attention in the local press. Channel 7 maintains that, regardless, the decision to “pursue a story on a given subject for whatever reason cannot be considered ‘staging’ the news” and to conclude otherwise would impinge upon its right to exercise editorial discretion.² Channel 7 states that, in any case, the TV-Warren story was not false or deceptive, and that it made every effort to correct the inaccuracies in the promotional spot before the story aired. With respect to the misrepresentation issue, Channel 7 argues that it was correct to answer “no” to Section II, item 2(b) of the renewal application since the application was not pending at the time the certification was made, and Channel 7 “had no way of knowing whether any challenge to its application would actually be raised or whether any such challenge would implicate ‘character issues’ as defined by the FCC.”³

Discussion. Section 309(k)(1) of the Communications Act of 1934 (the “Act”) states that the Commission shall grant a license renewal application if it finds, with respect to that station, that (a) the station has served the public interest, convenience, and necessity; (b) there have been no serious violations by the licensee of the Communications Act or Commission rules and regulations; and (c) there have been no other violations by the licensee of this Act or the rules or regulations of the Commission which, taken together, would constitute a pattern of abuse.⁴ The Commission applies a two-step analysis to a petition to deny under the public interest standard. The petition must first contain specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest.⁵ If the allegations meet

¹ *Opposition to Petition to Deny*, at 7.

² *Id.* at 8.

³ *Id.* at 10.

⁴ 47 U.S.C. §309(k)(1). Mr. Greiner has demonstrated standing in this case as a resident in station WXYZ-TV’s service area. See *Chet-5 Broadcasting, L.P.*, 14 FCC Rcd 13041, 13042 (1999).

⁵ 47 U.S.C. §309(d)(1); *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (“*Astroline*”).

this test, then the Commission will designate the application for hearing when the allegations, together with any opposing evidence before the Commission, raise a substantial and material question of fact as to whether granting the application would serve the public interest, or if the Commission is otherwise unable to conclude that granting the application would serve the public interest.⁶

The Commission has not codified its news distortion policy and, therefore, for purposes of section 309(k)(1) of the Act, any violation is only relevant to the extent it indicates that grant of the application would not be in the public interest. The U.S. Court of Appeals for the District of Columbia has stated that the first step of the public interest analysis “is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established.”⁷ “News distortion” involves the deliberate distortion or “staging” of news. Assuming for the moment that the “Michigan Boys” story intended to question, as stated by Ms. Gilchrist, the propriety of officials interacting with prostitutes during public events, the solicitation of prostitutes for the specific purpose of interacting with the targets of the story, if true, could constitute “staging.” A reasonable fact finder, under these circumstances, could conclude that grant of the renewal application would disserve the public interest and, therefore, the allegations in the Petition meet the first step of the Commission’s public interest analysis.

At the second step, a substantial and material question is raised when “the totality of the evidence arouses a sufficient doubt on the [question whether grant of the application would serve the public interest] that further inquiry is called for.”⁸ The Commission has stated that it will not find an allegation of news distortion to be substantial and material unless the petitioner provides extrinsic evidence of deliberate distortion or falsification of the news involving the licensee, its top management, or its news management.⁹ Evidence is extrinsic if it comes from a source outside the broadcast itself, such “as oral and written instructions from station management, outtakes, or evidence of bribery,” as well as testimony, written or otherwise, from “insiders” or persons who have direct personal knowledge of an intentional falsification of the news.¹⁰ On this basis, some of the evidence provided by Mr. Greiner is arguably extrinsic. In evaluating the evidence before us, however, we do not find that it raises a substantial and material question of fact concerning deliberate distortion or falsification of the news.

Mr. Greiner claims no personal knowledge of Mr. Wilson’s alleged attempt to acquire prostitutes for the “Michigan Boys” story. His sole piece of evidence is rather an article contained in a Costa Rican internet newspaper. The article’s unnamed author likewise had no personal knowledge of Mr. Wilson’s activities in Costa Rica, but instead relied on a newspaper account by reporter Otto Vargas from the Spanish-Language newspaper “La Nacion.” Mr.

⁶ *Astroline*, 857 F.2d at 1561; 47 U.S.C. §309(e).

⁷ *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). *See also Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (affirming two-step public interest analysis).

⁸ *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C.Cir.1985).

⁹ *Galloway v. FCC*, 778 F.2d 16, 20 (D.C. Cir. 1985).

¹⁰ *Id.*

Greiner provided no affidavit or declaration from Otto Vargas. In contrast, Mr. Wilson and his photographer, in separate declarations, have each specifically denied having procured prostitutes for the “Michigan Boys” story. Both the online article and the newspaper report upon which it is based are hearsay, and, as such, neither is reliable evidence of deliberate distortion or falsification of the news and cannot support a petition to deny.¹¹

Journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment’s Free Press guarantee, and licensees are entitled to the broadest discretion in the scheduling, selection and presentation of news programming.¹² For this reason, we are reluctant to evaluate station WXYZ-TV’s purpose in airing the TV-Warren story. We do not find Mr. Greiner’s allegations concerning Mr. Wilson’s conversation with a member of the TV-Warren news staff, even if accurate, to be indicative of deliberate distortion or falsification of the news. Mr. Wilson states that he pursued the TV-Warren story because it was an issue of public importance, and the record evidence supports this conclusion. Any factual inaccuracies in the promotional spot, if they did exist, were likewise not part of a plan of deliberate falsification, as an e-mail exchange attached to the Petition to Deny demonstrates that Mr. Wilson attempted to address the factual questions prior to airing the story.

With respect to the allegation of misrepresentation, Section II, item 2(b) of the renewal application requests that the applicant certify whether it or a party to the application has had any interest in, or connection with any pending broadcast application in which character issues have been raised. Because the application was not pending when the certification was made, the question could not apply to the dispute at issue here. More importantly, the purpose of Section II, item 2(b) is to ensure that the applicant discloses unresolved character issues raised in other applications. It does not require an applicant to “predict” petitions to deny.

Accordingly, the Petition to Deny filed by Michael Greiner **IS DENIED**.

Sincerely,

¹¹ *Pikes Peak Broadcasting Company, Inc.*, 12 FCC Rcd 4626, 4630 (1997). See also *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982); *Rothschild Broadcasting Company, Inc.*, 10 FCC Rcd 7226, 7227 (1995); *Post-Newsweek Stations, Florida, Inc.*, 49 FCC 2d 92 (Rev. Bd. 1974).

¹² See, e.g., *National Broadcasting Company v. FCC*, 515 F.2d 1101, 1112-1113, 1119-1120, 1172 (1974), vacated as moot id. at 1180, cert. denied 424 U.S. 910 (1976); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 124 (1973); *Hunger in America*, 20 FCC 2d at 150-51.

Barbara A. Kreisman
Chief, Video Division
Media Bureau