



DA 07-3865

In Reply Refer to:

1800B3-TSN

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The University of Washington
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Seattle, WA 98105

Mr. Virgil Howard
P.O. Box 20007
Seattle, WA 98102

In re: **The University of Washington**
KUOW-FM, Seattle, Washington
Facility ID No. 66571

**Application for Renewal of
Noncommercial Educational
FM Radio Station License**

Dear Petitioner and Applicant:

We have before us a “Petition to Deny Broadcast License Renewal to NPR Public Radio Station KUOW” (“Petition”) filed by Mr. Virgil Howard (“Howard”). Howard seeks denial of The University of Washington’s (“UW”) application for renewal of the license of noncommercial educational FM broadcast station KUOW-FM (“Application”).¹ For the reasons set forth below, we deny the Petition and grant the Application.

Background. UW timely filed the Application on September 30, 2005.² On December 21, 2005, Howard timely filed the Petition.³ UW filed an Opposition to Petition to Deny (“Opposition”) on January 20, 2006, with Howard filing a “Response to KUOW’s Opposition of Petition to Deny Broadcast License Renewal” (“Howard January Reply”) on January 30, 2006. After the pleading cycle concluded, the parties filed various additional pleadings.⁴

Discussion. Procedural Issues. UW attacks both Howard’s standing to file a petition to deny and Howard’s failure to provide an affidavit or a declaration under penalty of perjury.⁵ Only individuals residing in a station’s service area have standing to challenge its license renewal application.⁶ UW specifically questions, at some length, whether Howard resides in the KUOW-FM listening area or merely

¹ File No. BRED-20050930BGC.

² Radio stations in Washington state were to file their renewal applications by October 1, 2005, with the licenses expiring February 1, 2006.

³ Under 47 C.F.R. § 73.3516(e), petitions to deny the Application were to be filed by January 1, 2006.

⁴ These include UW’s Motion for Leave to File Supplemental Pleading in Opposition to Petition to Deny and Supplemental Pleading in Opposition to Petition to Deny (collectively, “Supplemental Opposition”), filed May 22, 2006; Howard’s May 30, 2006, letter indicating no opposition to UW’s filing the Supplemental Opposition; “Petitioner Virgil Howard’s Final Response to KUOW’s Opposition,” filed August 16, 2006 (“Howard August Reply”); and UW’s September 1, 2006, letter referencing the Howard August Reply and offering to respond further if requested.

⁵ Opposition at 2-4, Supplemental Opposition at 2-3.

⁶ See, e.g., *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, Memorandum Opinion and Order, 82 FCC2d 89, 98-99 (1980) (an individual may qualify as a party in interest if he alleges he is a listener or viewer of the station in question or resides within the station’s service area). See also *National Broadcasting Co., Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 10779, 10780 (1996) (denying standing to individual who viewed WNBC-TV on frequent travels to New York City; the Commission accords standing to those who reside in the service area, not to transients). See also *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

listens to the station online.⁷ With regard to his standing, Howard states in the Petition that he “is a person of interest and has standing to make this Petition,”⁸ and further states that from 1979 to the present, he has listened to KUOW-FM “an average of 20 hours per week.”⁹

The Howard December Affidavit, which is offered in support of the Petition, is neither sworn nor provided under penalty of perjury, stating merely that “[t]he information provided in this Affidavit is to the best of my knowledge, true and accurate,” and signed by Howard.¹⁰ Although Howard states his belief that the Howard December Affidavit complies with statutory requirements,¹¹ Section 309(d) of the Communications Act of 1934, as amended (the “Act”) requires either a sworn affidavit¹² or a declaration under penalty of perjury in support of the petition’s allegations, including the petitioner’s standing.¹³ Moreover, although the Howard August Reply contains a declaration under penalty of perjury attesting to Howard’s continued residence in Seattle from 1980 to the present, and purporting to verify his prior statements in support of his allegations,¹⁴ such a retroactive declaration is inadequate to cure the failure to provide such an affidavit or declaration with the Petition.¹⁵ Accordingly, we find that Howard has not established standing to file a petition to deny, nor has he provided a sufficient affidavit or declaration in support of the Petition. We therefore consider his Petition as an informal objection under Section 73.3587 of the Rules.¹⁶

⁷ Opposition at 2-4, Supplemental Opposition at 2-3.

⁸ Petition at 1.

⁹ “Affidavit of Virgil Howard in Support of Petition to Deny Broadcast License Renewal to KUOW,” attached to Petition (“Howard December Affidavit”), para. 4.

¹⁰ Howard December Affidavit at 5 (following para. 22).

¹¹ Howard January Reply at 2.

¹² See *A.V. Lauttamus, II d/b/a Beep-Call*, Memorandum Opinion and Order, 4 FCC Rcd 2339, 2339 n.5 (WTB 1989) (adopting definition of “affidavit” as a “written or printed declaration or statement of facts, made voluntarily, and confirmed: by oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.”).

¹³ See 47 U.S.C. § 309(d)(1). See also 47 C.F.R. § 1.16 (allowing unsworn declaration under penalty of perjury in lieu of a sworn affidavit in certain circumstances). See also *Newsystems of Pennsylvania, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 73, 74 (1987) (affidavit based only upon the affiant’s best knowledge, information, and belief is insufficient for purposes of Section 309(d)(1) of the Act; also, affidavits that are neither sworn nor given under penalty of perjury are insufficient).

¹⁴ Declaration of Virgil Howard, attached to Howard August Reply, at paras. 1, 7.

¹⁵ See *San Francisco Unified School District*, Hearing Designation Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 13326, 13327-28 (2004); *Infinity Broadcasting Corporation of California*, Memorandum Opinion and Order, 10 FCC Rcd 9504, 9506 (1995).

¹⁶ 47 C.F.R. § 73.3587.

Substantive Matters. In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act.¹⁷ That section provides that if, upon consideration of the application and pleadings, we find 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.¹⁸ Moreover, as with all petitions to deny or informal objections, here we must first determine whether Howard has made specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. If the specific allegations make a *prima facie* case, we next examine and weigh the evidence presented, to determine “whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for.”¹⁹ We must also determine whether grant or denial of the application would serve the public interest.²⁰

In essence, Howard accuses UW of using its call-in talk shows – specifically the “Weekday” and “The Conversation” programs – as a means to conduct “clandestine” focus group research on certain topics (including and especially the Seattle monorail project), and then selling that research to undisclosed paying customers, all without the knowledge of callers or listeners to those programs.²¹ Because of this, Howard states that UW is guilty of “deliberately misleading, deceiving, defrauding and exploiting [its] faithful listening public – for financial gain.”²²

UW specifically denies Howard’s allegations, insisting that no such “focus groups” are being conducted on-air and stating that, while it did take underwriting funds from groups affiliated with the Seattle monorail project, such funds were not used to sponsor talk shows during which the monorail project was the topic.²³ Further, UW states that any decisions to discuss the monorail project on air were

¹⁷ 47 U.S.C. § 309(k).

¹⁸ 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).

¹⁹ *Citizens for Jazz on WRVR v. F.C.C.*, 775 F.2d 392, 395 (D.C. Cir. 1985). See also 47 U.S.C. § 309(d)(1) (“The petition shall contain specific allegations of fact sufficient to show that . . . grant of the application would be *prima facie* inconsistent with [Section 309(a)]. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.”); 47 C.F.R. § 73.3584(b).

²⁰ *Astroline Communications Co. v. F.C.C.*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (“Astroline”). See also *Rocky Mountain Radio Co., LLP*, Memorandum Opinion and Order, 15 FCC Rcd 7166, 7167 (1999).

²¹ Petition at 2. While Howard does not specify the rules or statutes he believes have been violated, we presume that he is claiming that UW violated 47 C.F.R. §§ 73.503(d) and 73.1212, insofar as he alleges that the talk shows were broadcast at the expense of certain parties, who were not identified, who paid UW for the “focus group” research gleaned from the programming.

²² Petition at 1.

²³ Declaration of Wayne Roth (“Roth Declaration”), attached to Opposition, paras. 5, 10. See also Declaration of Steve Scher (“Scher Declaration”), attached to Opposition, para. 3.

solely the result of journalistic decisions concerning a topic of community importance.²⁴ Even absent UW's denials, however, Howard has not provided the quantum of evidence necessary to state a *prima facie* case that grant of the Application would be contrary to the public interest. Howard's evidence in support of his "focus group" allegation essentially consists of the fact that he has participated in focus groups, and that because of this experience he "came to believe that focus groups techniques were being used in KUOW(FM)'s live broadcast talk-shows."²⁵ Howard further suggests that UW's refusal to respond to his various attempts to discuss his accusations with KUOW-FM and UW staff confirms the truth of his allegations.²⁶ Additionally, Howard's examination of various documents obtained from the Washington Secretary of State leads him to accuse UW of hiding the identities of donors who, Howard believes, were paying for the alleged focus group research.²⁷ Specifically, Howard notes that while UW lists many of its business donors it fails to identify the sources of unsolicited income, concluding that these sources may include payments for the alleged focus group research.²⁸ UW, for its part, states that such unsolicited income is derived from many sources, such as the Corporation for Public Broadcasting, grants and major gifts, state and university funding, and interest on endowments or investments, reiterating that it receives no funds for conducting undisclosed on-air research.²⁹

We find that Howard's evidence, as set forth in the Howard December Affidavit, is insufficient to support his allegations. Howard's "evidence" consists of little more than suspicions and sinister interpretations of otherwise neutral facts, as well as logical leaps to unsupported conclusions. Allegations consisting merely of ultimate, conclusory facts or more general affidavits are not sufficient to raise a substantial and material question of fact against UW and KUOW-FM.³⁰ Likewise, allegations that do not even rise to the level of ultimate facts, but merely raise questions and demand Commission investigation, do not suffice to raise such a question.³¹ Thus, we find that Howard fails to raise a substantial and material question of fact regarding the operation of KUOW-FM warranting further inquiry or action.

²⁴ Roth Declaration, para. 11; Scher Declaration, para. 4.

²⁵ Howard December Affidavit, para. 7.

²⁶ Petition at 3; Howard December Affidavit, paras. 8, 16, 18-19, 21.

²⁷ *Id.*, paras. 14-15.

²⁸ *Id.*, para. 15; Petition at 3.

²⁹ Opposition at 7; Roth Declaration, para. 7. Howard also accuses "Weekday" host Steve Scher of taking part in scripted programming, stating that on an undisclosed date Scher conducted an interview with author Jeffrey Toobin that was "exactly the same" as another interview with Toobin that Howard had heard a week previously on station KNPR(FM), Las Vegas, Nevada. Howard suggests that the fact this interview was not disclosed as being scripted reflects negatively on KUOW-FM's "credibility and honesty to listeners." Howard December Affidavit, para. 22. Howard re-states this allegation at greater depth in the Howard January Reply at 2-4, and the Howard August Reply at 3, 6. While Scher specifically denies the accusation (Declaration of Steve Scher, attached to Supplemental Opposition, paras. 2-4), we find that this allegation is not only vague as to the time of the alleged broadcasts, but also that it is neither probative of Howard's other allegations nor in itself indicative of any violation of the Act or the Commission's Rules.

³⁰ *Gencom, Inc. v. F.C.C.*, 832 F.2d 171, 180 n.11 (D.C. Cir. 1987).

³¹ See *Mr. Lawrence E. Steelman, Capstar TX Limited Partnership, Mr. Stanley Daniels*, Letter, 22 FCC Rcd 4866, 4869 (MB 2007) (petition for reconsideration "was an amalgam of conclusion, speculation, supposition, trade press articles, and other material that did not raise a substantial and material question of fact," thus no evidentiary hearing (continued next page))

Conclusion. As discussed above, Howard's Petition consists of no more than a recitation of Howard's suspicions regarding UW's operation of KUOW-FM and its programming, and Howard's allegations do not rise to the level necessary for us to find a substantial and material question of fact regarding UW's qualifications to be a Commission licensee. We further find no evidence of violations of the Act or the Rules regarding the operation of KUOW-FM during the subject license term. Finally, we find that Station KUOW-FM served the public interest, convenience, and necessity during the subject license term. Accordingly, the Petition IS DENIED. IT IS ORDERED that, pursuant to Section 309(k) of the Communications Act of 1934, as amended, the license renewal application of The University of Washington, for Station KUOW-FM, Seattle, Washington (File No. BRED-20050930BGC) IS GRANTED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Ernest T. Sanchez, Esq. and Susan M. Jenkins, Esq., counsel for University of Washington

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was required). *See also Mr. Benjamin L. Stratemyer and Ms. Janet Jensen*, Letter, 21 FCC Rcd 11715, 11716 (MB 2006).