



**Federal Communications Commission  
Washington, D.C. 20554**

January 10, 2008

**DA 08-61**

*In Reply Refer to:*

1800B3-TSN

Released: January 10, 2008

Rev. Giacomo Capoverdi  
Mr. Nick Carlucci  
Ms. Grace Vertullo  
TFP Student Action  
c/o Dennis J. Kelly, Esq.  
Law Office of Dennis J. Kelly  
P.O. Box 41177  
Washington, DC 20018

CBS Radio East Inc.  
c/o Philip A. Bonomo, Esq.  
Leventhal, Senter & Lerman PLLC  
Suite 600  
2000 K Street, N.W.  
Washington, DC 20006-1809

In re: **CBS Radio East Inc.**  
WWFS(FM), New York, New York  
Facility ID No. 25442  
File No. BRH-20060201BEE

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

Dear Petitioners and Applicant:

We have before us a Petition to Deny ("Petition") jointly filed by Rev. Giacomo Capoverdi, Mr. Nick Carlucci, Ms. Grace Vertullo, and TFP Student Action (collectively "Petitioners"). Petitioners seek denial of CBS Radio East Inc.'s ("CBS") application for renewal of the license of FM broadcast station WWFS(FM), New York, New York ("Application").<sup>1</sup> For the reasons set forth below, we deny the Petition and grant the Application.

---

<sup>1</sup> File No. BRH-20060201BEE. The station's call sign at the time the Application was filed was WNEW(FM); it changed its call letters to WWFS(FM) effective January 9, 2007.

**Background.** CBS timely filed the Application on February 1, 2006.<sup>2</sup> On May 1, 2006, Petitioners timely filed the Petition.<sup>3</sup> The three individual Petitioners allege that they reside within the 54 dBμ contour of WWFS(FM), and Petitioner TFP Student Action alleges that it has members on college campuses within the WWFS(FM) 54 dBμ contour. Petitioners claim standing to file their petitions on that basis. CBS filed an Opposition to Petition to Deny (“Opposition”) on May 31, 2006, with Petitioners filing a Reply to “Opposition to Petition to Deny” (“Reply”) on June 13, 2006.

**Discussion.** In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Communications Act of 1934, as amended (the “Act”).<sup>4</sup> 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 Commission’s Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.<sup>5</sup> Moreover, as with all petitions to deny, here we must first determine whether Petitioners have 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.”<sup>6</sup> We must also determine whether grant or denial of the application would serve the public interest.<sup>7</sup>

Petitioners’ arguments against renewing the WWFS(FM) license are largely based on their description of CBS as “a serial and recidivist violator of the federal criminal statute proscribing indecent, obscene or profane broadcasts, 18 U.S.C. § 1464.”<sup>8</sup> In addition to reciting earlier cases against CBS and its predecessor in interest, chiefly surrounding broadcasts by Howard Stern,<sup>9</sup> Petitioners focus on the activities of radio personalities “Opie and Anthony.” In particular, Petitioners complain about the

---

<sup>2</sup> Radio stations in New York were to file their renewal applications by February 1, 2006, with the licenses expiring June 1, 2006.

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

<sup>4</sup> 47 U.S.C. § 309(k).

<sup>5</sup> 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).

<sup>6</sup> *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).

<sup>7</sup> *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).

<sup>8</sup> Petition at 3.

<sup>9</sup> *Id.* at 3-5.

incident of August 15, 2002, in which Opie and Anthony broadcast over WWFS(FM) an employee describing two individuals engaged in sexual activity in St. Patrick's Cathedral, New York, while Catholic Mass was taking place.<sup>10</sup> Petitioners also cite other sexually themed promotions by Opie and Anthony, although they do not allege specific broadcasts relating to said promotions, relying instead on Opie and Anthony's Website for evidence.<sup>11</sup>

CBS states that the broadcast incidents alleged in the Petition either did not occur over WWFS(FM), or were settled in a 2004 Consent Decree with the Commission ("Viacom Consent Decree") that specifically precludes consideration of the incidents alleged in determining whether to renew the WWFS(FM) license.<sup>12</sup> Petitioners counter that the Viacom Consent Decree is legally null and void, because it purports to deprive Petitioners of review of CBS's entire record during the WWFS(FM) license term, and because it was not authorized by Congress and is thus *ultra vires*.<sup>13</sup> Moreover, Petitioners suggest that the Commission's "broadcast enforcement scheme appears to be racially discriminatory on its face,"<sup>14</sup> because Petitioners argue that African-American broadcasters in two other cases either were not allowed to reach consent decrees with the Commission, or reached consent decrees on terms less favorable than those obtained by CBS and its predecessors.<sup>15</sup>

CBS is correct that we may not consider either incidents that occurred at other radio stations<sup>16</sup> or that occurred prior to the current license term in evaluating whether the WWFS(FM) license should be renewed.<sup>17</sup> Thus, the notices of apparent liability for forfeiture listed in the Petition that antedate WWFS(FM)'s preceding license term, or that were issued to other stations, will not be considered. We likewise may not consider the prior Notice of Apparent Liability for Forfeiture issued to WWFS(FM), as this was rescinded by the Commission in the November 2004 Viacom Consent Decree.<sup>18</sup> We also decline to consider alleged indecency occurring on a Website associated with WWFS(FM) or its air personalities.

---

<sup>10</sup> *Id.* at 5-6.

<sup>11</sup> *Id.* at 7-8.

<sup>12</sup> Opposition at 2-5.

<sup>13</sup> Petition at 17-19; Reply at 2-5. In the Petition, Petitioners erroneously date the Order approving the Viacom Consent Decree as November 23, 2005; the Order was actually released November 23, 2004. *Viacom, Inc.*, Order, 19 FCC Rcd 23100 (2004) ("*Viacom Consent Decree Order*") (approving the Viacom Consent Decree between the Commission and CBS's parent, predecessor, and fellow subsidiaries).

<sup>14</sup> Petition, Summary at second unnumbered page.

<sup>15</sup> Petition at 14-16.

<sup>16</sup> See *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC2d 1179, 1223 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992) "[T]here should be no presumption that misconduct at one station is necessarily predictive of the operation of the licensee's other stations."

<sup>17</sup> See 47 U.S.C. § 309(k)(1); see also *United Broadcasting Company, Inc.*, Memorandum Opinion and Order, 100 FCC2d 1574, 1577 (1985) (ordinarily, determination of whether a licensee's record merits a renewal expectancy focuses on the license term preceding the filing of the renewal application in question).

<sup>18</sup> *Viacom Consent Decree Order*, 19 FCC Rcd at 23100, 23103, 23106-07.

Petitioners have not presented any evidence that such indecency also occurred on-air outside of the “safe harbor” hours of 10:00 p.m. to 6:00 a.m.<sup>19</sup>

We further find no merit in Petitioners’ contentions regarding the alleged unlawfulness of the Viacom Consent Decree. Since the Petition and Reply were filed, the Commission had occasion to consider Petitioners’ allegation (albeit as brought by other parties) that entering into the Viacom Consent Decree was an *ultra vires* act.<sup>20</sup> The Commission concluded that an agency has broad discretion to settle or dismiss an enforcement action,<sup>21</sup> and that it appropriately exercised that discretion when it entered into the Viacom Consent Decree.<sup>22</sup> In light of the Commission’s holding in the *Viacom Reconsideration Decision*, we need not consider Petitioners’ arguments further.

Finally, Petitioners contend that the Commission’s “broadcast enforcement scheme appears to be racially discriminatory on its face.”<sup>23</sup> Petitioners cite no specific code section, policy statement, or other explication of the Commission’s “broadcast enforcement scheme” to support this vague charge. Based on Petitioners’ argument, it appears they intended to argue that the Commission’s enforcement is discriminatory as applied, and that the Commission selectively decides, based on race, whom to prosecute or with whom to settle on “favorable” terms. We reject such contentions. Neither of the two cases cited by Petitioners as evidence of racial discrimination involves allegations of indecency or fact situations similar to that presented here. *Willis Broadcasting Corp.*<sup>24</sup> involved forfeitures imposed for various technical and public safety violations; additionally, the Commission sought and obtained a default judgment against the violator in the amount of \$85,000. The consent decree in that case allowed the violator’s licenses to be renewed conditioned on their assignment. Any differential treatment between Willis and CBS in the instant case can thus be explained for the most part by the differing procedural postures of the two cases. *Family Broadcasting, Inc.*<sup>25</sup> involved a station that was off the air for over 12 consecutive months without proper notification or request for silent authority. The existence of these two non-indecency enforcement cases involving minorities, which were published in the decade preceding the filing of the Petition, does not raise a substantial and material question that the Commission is engaged in systematic racial discrimination in its enforcement procedures.<sup>26</sup> We therefore reject Petitioners’ argument.

---

<sup>19</sup> 47 C.F.R. § 73.3999(b).

<sup>20</sup> *Viacom, Inc.*, Order on Reconsideration, 21 FCC Rcd 12223 (2006) (“*Viacom Reconsideration Decision*”).

<sup>21</sup> *Viacom Reconsideration Decision*, 21 FCC Rcd at 12226 (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), and *Schering Corp. v. Heckler*, 779 F.2d 683, 685 (D.C. Cir. 1985)).

<sup>22</sup> *Viacom Reconsideration Decision*, 21 FCC Rcd at 12226-27.

<sup>23</sup> See *supra* note 14.

<sup>24</sup> 19 FCC Rcd 10502 (2004).

<sup>25</sup> Hearing Designation Order, 11 FCC Rcd 6647 (MB 1996).

<sup>26</sup> Cf. *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480 (1996) (defendants attempting to show that government selectively prosecuted drug cases based on race must show that similarly situated individuals of a different race were not prosecuted; defendants’ study of 24 other defendants “failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted,” and thus did not constitute evidence tending to show the existence of the essential elements of a selective prosecution claim. 517 U.S. at 470, 116 S.Ct. at 1480 (emphasis added)).

**Conclusion.** As discussed above, Petitioners complain of conduct on the part of CBS that has already been resolved in the Viacom Consent Decree, and the Commission has rejected the argument that its resolution of these issues was inappropriate or *ultra vires*. Petitioners have also fallen far short of their burden of raising an issue that the Commission's enforcement policies are racially discriminatory as applied. Accordingly, the Petition IS DENIED. IT IS ORDERED that, pursuant to Section 309(k) of the Act, the license renewal application of CBS Radio East, Inc., for Station WWFS(FM), New York, New York (File No. BRH-20060201BEE) IS GRANTED.

Sincerely,

Peter H. Doyle, Chief  
Audio Division  
Media Bureau