

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

In the Matter of)	
)	
WAY-FM MEDIA GROUP, INC.)	EB-09-IH-0500
)	Facility ID No. 89401
Licensee of Noncommercial Educational)	NAL Account No. 201032080014
Station KXWA(FM), Loveland, Colorado)	FRN No. 0004995288

CONSENT DECREE

1. The Enforcement Bureau (“Bureau”) and WAY-FM Media Group, Inc. (“Licensee”), by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Enforcement Bureau’s above-referred investigation into whether the Licensee violated Section 399B of the Communications Act of 1934, as amended,¹ and Section 73.503(d) of the Commission’s Rules,² in connection with the broadcast by the Licensee of underwriting acknowledgments over its noncommercial educational Station KXWA(FM), Loveland, Colorado.

I. DEFINITIONS

2. For the purposes of this Consent Decree, the following definitions shall apply:
- (a) “Act” means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
 - (b) “Adopting Order” or “Order” means an Order by the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) “Bureau” means the Enforcement Bureau of the Federal Communications Commission.
 - (d) “Commission” and “FCC” mean the Federal Communications Commission and all of its bureaus and offices.
 - (e) “Complaint” means that certain third party complaint received by or in the possession of the Bureau, forming the basis for the Bureau’s May 13, 2008 Letter of Inquiry,³ regarding whether the Licensee violated the Commission’s Underwriting Laws in connection with its operation of the Station on April 14, 2009.
 - (f) “Compliance Plan” means the program described in this Consent Decree at paragraph 9.
 - (g) “Effective Date” means the date on which the Commission releases the Adopting Order.
 - (h) “Investigation” means the investigation concerning the Complaint commenced by the Bureau’s May 13, 2008 Letter of Inquiry⁴ regarding whether the Licensee violated the

¹ See 47 U.S.C. § 399b.

² See 47 C.F.R. § 73.503(d).

³ See Letter from Kenneth M. Scheibel, Jr., Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to WAY-FM Media Group, Inc. (“LOI”).

⁴ See *id.*

Commission's Underwriting Laws in connection with its operation of the Station on April 14, 2009.

- (i) "Licensee" means the WAY-FM Media Group, Inc. and its predecessors-in-interest and successors-in-interest as licensee of the Station.
- (j) "Parties" mean the Licensee and the Bureau.
- (k) "Rules" mean the Commission's regulations found in Title 47 of the Code of Federal Regulations.
- (l) "Station" means noncommercial educational Station KXWA(FM), Loveland Colorado (Facility ID No. 89401).
- (m) "Underwriting Laws" mean Section 399B of the Communications Act of 1934, 47 U.S.C. § 399b, and Section 73.503(d) of the Commission's Rules, 47 C.F.R. § 73.503(d).

II. BACKGROUND

3. Pursuant to Section 399b(a) of the Act⁵ and Section 73.503(d) of the Rules, advertisements are defined as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of for-profit entities.⁶ Section 399b(b)(2) specifically provides that noncommercial educational stations may not broadcast advertisements.⁷ Although contributors of funds to such stations may receive on-air acknowledgements of their support, the Commission has held that such acknowledgements may be made for identification purposes only, and should not promote the contributors' products, services, or businesses.⁸ Specifically, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease.⁹ 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 and is consistent with the Commission's Rules and decisions establishing compliant underwriting announcements. Consequently, the Commission expects licensees to exercise reasonable, "good faith" judgment in this area, and affords some latitude to the judgments of licensees who do so.¹⁰

4. On May 13, 2009, the Bureau issued a letter of inquiry ("LOI") to the Licensee, which directed the Licensee, among other things, to submit a sworn written statement in response to questions relating to allegations that the Licensee had aired announcements in violation of the Underwriting Laws. The Licensee responded on June 12, 2009.¹¹ The announcements may have violated the Underwriting

⁵ See 47 U.S.C. § 399b.

⁶ See 47 U.S.C. § 399b(a).

⁷ See 47 U.S.C. § 399b(b)(2).

⁸ See *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, Public Notice (1986), republished, 7 FCC Rcd 827 (1992) ("Public Notice").

⁹ See *id.*

¹⁰ See *Xavier University*, Letter of Admonition, issued November 14, 1989 (Mass Med. Bur.), *recons. granted*, Memorandum Opinion and Order, 5 FCC Rcd 4920 (1990) ("*Xavier*").

¹¹ See Letter from A. Wray Fitch, III, attorney for WAY-FM Media Group, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated June 12, 2009.

Laws because they appear to exceed the bounds of what is permissible and within licensee discretion under the Act and pertinent Commission precedent.¹²

III. TERMS OF AGREEMENT

5. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order without change, addition, modification, or deletion.

6. **Jurisdiction.** The Licensee agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.

7. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the date on which the FCC releases the Adopting Order. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other Order of the Bureau. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Bureau Order, entitling the Bureau to exercise any rights and remedies attendant to the enforcement of a Commission Order.

8. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate its Investigation and dismiss the Complaint. In consideration for the termination of said Investigation and dismissal of the Complaint, the Licensee agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that, in the absence of new material evidence, the Bureau will not use the facts developed in this Investigation through the Effective Date of the Consent Decree, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against the Licensee concerning the matters that were the subject of the Investigation. The Bureau also agrees that it will not use the facts developed in this Investigation through the Effective Date of this Consent Decree, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against the Licensee with respect to the Licensee's basic qualifications, including its character qualifications, to be a Commission licensee or to hold Commission authorizations.

9. **Compliance Plan.** For purposes of settling the matters set forth herein, the Licensee agrees to maintain a Compliance Plan related to future compliance with the Act, the Commission's Rules, and the Commission's Orders. The Plan will include, at a minimum, the following components:

a. Licensee will use a multi-level review procedure for underwriting content to be broadcast on the Station. All scripts of announcements will continue to be reviewed by the Licensee or its staff, prior to broadcast, for compliance with the Underwriting Laws.

b. Licensee will train employees on acceptable underwriting content that complies with the Underwriting Laws. Within thirty days of being hired by the Licensee, any new Station employee will be trained as to acceptable underwriting content that complies with the Underwriting Laws. In addition, the Licensee's Station employees will receive refresher training, on an annual basis, regarding existing guidelines and, where applicable, pertinent changes to the Underwriting Laws.

¹² See *Xavier*, *supra* note 10.

c. Licensee will also implement and maintain a plan to educate prospective underwriters about appropriate underwriting content and how the Licensee incorporates such underwriting content in the messages that it prepares for underwriter approval and eventual broadcast. To that end, the Licensee will summarize the Underwriting Laws for each client before it accepts any contract with the prospective underwriter to air underwriting messages over the Station and prepares the underwriting message for the underwriter's review. The Licensee will not broadcast any announcement that does not comply with the Underwriting Laws.

10. **Compliance Reports.** Licensee will file compliance reports with the Commission ninety days after the Effective Date, twelve months after the Effective Date, twenty-four months after the Effective Date, and upon expiration of this Consent Decree, three years after the Effective Date. Each compliance report shall include a compliance certificate from an officer, as an agent of the Licensee, stating that the officer has personal knowledge that the Licensee has established and maintained on an ongoing basis operating procedures intended to ensure compliance with this Consent Decree, together with an accompanying statement explaining the basis for the officer's compliance certification. Each compliance report will describe any significant difficulties the Licensee has encountered during the reporting period in ensuring compliance with the Underwriting Laws, what steps it has taken to resolve those difficulties, and the success of those steps in doing so. All compliance reports shall be submitted to the Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, Room 4-C330, 445 12th Street, S.W., Washington, D.C. 20554.

11. **Termination Date.** Unless stated otherwise, the requirements of this Consent Decree will expire three (3) years after the Effective Date.

12. **Voluntary Contribution.** Licensee agrees that it will make a voluntary contribution to the United States Treasury in the amount of one thousand dollars (\$1,000). The payment will be made within five (5) calendar days after the Effective Date of the Adopting Order. The payment must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced in the caption to the Adopting Order. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). The Licensee will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, Anjali.Singh@fcc.gov, and Anita.Patankar-Stoll@fcc.gov.

13. **Waivers.** The Licensee waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Order adopting this Consent Decree, provided the Commission issues an Order adopting the Consent Decree without change, addition, modification, or deletion. The Licensee shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither the Licensee nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and the Licensee shall waive any statutory right to a trial *de novo*. The Licensee hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

14. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of this Consent Decree to which the Licensee does not expressly consent), that provision will be superseded by such Commission rule or Order.

15. **Successors and Assigns.** The Licensee agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

16. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties. The Parties further agree that this Consent Decree does not constitute either adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Act or the Commission's Rules and Orders. The Parties agree that this Consent Decree is for settlement purposes only and that by agreeing to this Consent Decree, the Licensee does not admit or deny noncompliance, violation or liability for violating the Act, the Commission's Rules or Orders in connection with the matters that are the subject of this Consent Decree.

17. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

18. **Paragraph Headings.** The headings of the Paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

19. **Authorized Representative.** Each party represents and warrants to the other that it has full power and authority to enter into this Consent Decree.

20. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

P. Michele Ellison
Chief
Enforcement Bureau

Date

Bob Augsburg
President
WAY-FM Media Group, Inc.

Date