Federal Communications Commission
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In re: **Red Zebra Broadcasting Licensee, LLC**
WWXX(FM), Buckland, Virginia
Facility ID No. 16819
File No. BRH-20110601ACB

Informal Objections

Dear Sirs:

We have before us the application ("Application") of Red Zebra Broadcasting Licensee, LLC ("Red Zebra") for renewal of its license for WWXX(FM), Buckland, Virginia ("Station"). We also have before us pleadings ("Objections") filed by John F. Banzhaf III ("Banzhaf"), Louis Ramon Grimaldi ("Grimaldi"), Jay Winter Nightwolf ("Nightwolf"), and Verona Iriarte ("Iriarte").[1] These pleadings purport to be petitions to deny the Application. As discussed below, we dismiss the pleadings as petitions to deny, deny them when considered as informal objections, and grant the Application.

Background. Red Zebra timely filed the Application on June 1, 2011. On September 2, 2014, Banzhaf filed his pleading. Banzhaf urges us to deny the Application because Red Zebra permits the Station's broadcast of the word "Redskins" to identify the professional football team named the Washington Redskins. In addition, Banzhaf questions whether Daniel Snyder ("Snyder"), the managing member of Red Zebra's parent company and the majority owner of the Washington Redskins, possesses the character qualifications required of a Commission licensee. Grimaldi, Nightwolf and Iriarte filed their pleadings on October 13, 2014. These pleadings adopt and incorporate by reference the Banzhaf pleading. They do not contain any additional arguments, assertions or allegations of fact.[2] Red Zebra filed a response to all of the pleadings ("Red Zebra Response") on October 17, 2014.

[1] Banzhaf filed his pleading ("Banzhaf Objection") on September 2, 2014. The others submitted their pleadings on October 13, 2014.

[2] It is for this reason that we discuss only arguments, assertions or allegations made by Banzhaf herein.

Discussion. **Procedural Issues.** Petitions to deny a renewal application must be filed by the first day of the last full calendar month of the expiring license term.[3] The deadline for filing petitions to deny the Application was September 1, 2011. Banzhaf, Grimaldi, Nightwolf, and Iriarte each filed their pleadings more than 3 years after this deadline. For this reason, the pleadings are procedurally defective. Accordingly, we dismiss all of the pleadings as petitions to deny. We will, however, consider them as informal objections under Section 73.3587 of the Commission's rules ("Rules").[4]

Substantive Issues. Under longstanding Commission precedent, informal objections to license renewal applications must provide properly supported allegations of fact that, if true, would establish that grant of the application would be *prima facie* inconsistent with Section 309(k) of the Act, which governs our evaluation of an application for license renewal.[5] Section 309(k)(1) provides that we are to grant a renewal application 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 that, taken together, constitute a pattern of abuse.[6] If such a finding cannot be made on the basis of the application and pleadings and grant with conditions is not appropriate under the circumstances, Section 309(k) provides that the license renewal application is to be designated for a hearing.

*Programming Complaints***.** Banzhaf objects to the Station's use of the word "Redskins" – which he characterizes as "a derogatory racial and ethnic slur" – during its coverage of the professional football team named the Washington Redskins.[7] He contends that this conduct demonstrates that the Station has not served the public interest, convenience and necessity and/or has violated the law or the Rules, and therefore that the Commission should deny the Application. We address and reject each of these arguments in turn below.

Obscenity. Section 1464 of Title 18 of the United States Code – which the Commission enforces – prohibits the broadcast of "obscene" language.[8] Banzhaf alleges that the term "Redskins" is akin to obscenity.[9] The Supreme Court of the United States has held that to be obscene, material must, among other things, depict or describe sexual conduct.[10] Banzhaf does not allege that the term "Redskins"

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[3] 47 C.F.R. § 73.3516(e).

[4] 47 C.F.R. § 73.3587.

[5] 47 U.S.C. § 309(d)(1). *See, e.g., Applications of Cumulus Licensing, Corp. (Assignor) and Clear Channel Broadcasting Licenses, Inc. (Assignee)*, Order, 16 FCC Rcd 1052, 1054 n.5 (2001) (stating that the Commission follows the same two-step analysis in assessing the merits of a petition to deny or informal objection and noting that the first step of the analysis is to determine whether "the pleading makes specific allegations of fact which, if true, would demonstrate that grant of the applicant would be *prima facie* inconsistent with the public interest"); *Area Christian Television, Inc*., Memorandum Opinion and Order, 60 RR 2d 862, 864 (1989) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

[6] 47 U.S.C. § 309(k)(1).

[7] Banzhaf Objection at 1.

[8] 18 U.S.C. § 1464. *See also* 47 U.S.C. § 503(b)(1)(D).

[9] Banzhaf Objection at 5-6.

[10] To be obscene, material must satisfy the three-part test set out in *Miller v. California,* 413 U.S. 15, 24 (1973). The test requires that (1) an average person, applying contemporary community standards, would find that the material, as a whole, appeals to the prurient interest; (2) the material depicts or describes, in a patently offensive way, sexual

depicts or describes sexual conduct in any way. Accordingly, we reject his argument that the term "Redskins" is akin to obscenity.

Profanity.[11] The Commission defined profanity in 2006 as "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[12] Due to "the sensitive First Amendment implications in this area," the Commission limited its regulation of profane language to "the universe of words that are sexual or excretory in nature or are derived from such terms."[13] However, even that limited definition was invalidated by the Court of Appeals for the Second Circuit.[14] Banzhaf argues that the word "Redskins" constitutes profanity.[15] He does not allege, however, that the word is sexual or excretory in nature or derived from terms that are. Instead, he asserts that the word "Redskins" is racially derogatory. While the Commission has "recognize[d] that additional words, such as language conveying racial or religious epithets, are considered offensive by most Americans," it made clear its intent "to avoid extending the bounds of profanity to reach such language given constitutional considerations."[16] Accordingly, we reject the argument that the word "Redskins" falls within the Commission's definition of profanity.

Public Interest, Convenience and Necessity. Banzhaf states that "repeated and unnecessary exposure" to the word "Redskins" causes "psychological harm, not only to Indian and non-Indian children, but also to Indian adults."[17] He asserts that, for these reasons, it is contrary to the mandate that broadcasters operate in the public interest, convenience and necessity for the Station to broadcast the word in its coverage of Washington's professional football team. Thus, Banzhaf urges us to find that the Station failed to serve the public interest, convenience and necessity, and deny the Application.

We reject Banzhaf's position in light of the First Amendment to the United States Constitution and Section 326 of the Act.[18] The First Amendment and Section 326 prohibit the Commission from censoring program material or interfering with broadcasters' free speech rights. In view of this, the Commission has stated that it will not take "adverse action on a license renewal application based only upon the subjective determination of a listener or group of listeners as to what constitutes appropriate

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conduct specifically defined by applicable law; and (3) the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

[11] Section 1464 of Title 18 of the United States Code – which, as noted above, the Commission enforces – also prohibits the broadcast of "profane" language. 18 U.S.C. § 1464.

[12] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664, 2669 ¶ 17 (2006) ("*2006 Indecency Order*"), *partially vacated and revised*, 21 FCC Rcd 13299 n.121 (2006), *rev'd, Fox Television Stations, Inc. v. FCC,* 489 F.3d 444, 461-462 (2d. Cir. 2007), *rev'd and remanded*, 552 U.S. 502 (2009).

[13] *See id.*

[14] *See id.* The Commission did not further defend its finding that the vulgar language at issue in *Fox* was profane. *See Fox Television Stations v. FCC,* 613 F.3d 317, 327 n.7 (2d Cir. 2010), vacated and remanded, 132 S. Ct. 2307 (2012).

[15] Banzhaf Objection at 6-11.

[16] *2006 Indecency Order*, 21 FCC Rcd at 2669 ¶ 18.

[17] Banzhaf Objection at 2.

[18] U.S. CONST. amend. I; 47 U.S.C. § 326.

programming."[19] It has recognized that: "Licensees have broad discretion – based on their right to free speech – to choose, in good faith, the programming they believe serves the needs and interests of their communities. This holds true even if the material broadcast is insulting to a particular minority or ethnic group in a station's community."[20] Indeed, the Commission has held that "if there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable and congenial."[21]

Banzhaf cites a number of Commission decisions that he asserts demonstrate the Commission has utilized the public interest standard to regulate content. These cases, however, do not support denial of the Station's license renewal in this case based on the fact that the Station broadcast the name "Redskins." For instance, Banzhaf cites *FCC v. Fox Television Stations, Inc.* ("*Fox*"),[22] and suggests that, therein, the Supreme Court of the United States affirmed that the Commission could rely on its public interest authority to expand the definition of "indecency" to include language that neither depicted nor described sexual or excretory organs or functions.[23] In fact, the court simply observed that its opinion left "the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements" and left "the courts free to review the current policy or any modified policy in light of its content and application."[24] Moreover, we note that, contrary to Banzhaf's assertion, in the underlying decision, the Commission did not expand the definition of "indecency."[25] The name "Washington Redskins" does not fall within that definition.

Banzhaf likewise mischaracterizes *Yale Broadcasting Company v. FCC*,[26] arguing that therein the U.S. Court of Appeals for the District of Columbia Circuit affirmed the Commission's use of the public interest standard to regulate the broadcast of songs that might promote or glorify the use of illegal drugs. In fact, as the court noted, the Commission merely reminded broadcasters that they must make "reasonable efforts" to determine the meaning of a song's lyrics prior to broadcasting the song.[27]

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[19] *See Citadel Broadcasting Co.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 7083, 7101 ¶ 41 (2007), *citing WGBH Educational Foundation,* Memorandum Opinion and Order, 69 FCC 2d 1250, 1251 ¶ 4 (1978).

[20] *Multicultural Radio Broadcasting Licensee, LLC,* Letter, 22 FCC Rcd 21429, 21434 (MB 2007), *citing License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania,* Memorandum Opinion and Order 8 FCC Rcd 6400, 6401 ¶ 7 (1993), and *Zapis Communications Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 3888, 3889 ¶ 7 (MB 1992).

[21] *Anti-Defamation League of B'nai B'rith,* Memorandum Opinion, 4 FCC 2d 190, 192 (1966), aff'd, Memorandum Opinion and Order, 6 FCC 2d 385 (1967), *aff'd sub nom. Anti-Defamation League of B'nai B'rith v. FCC,* 403 F. 2d 169 (1968), *cert. denied,* 394 U.S. 930 (1969).

[22] 132 S. Ct. 2307 (2012).

[23] Banzhaf Objection at 3.

[24] *Fox*, 132 S. Ct. at 2320.

[25] *Golden Globes Order*, 19 FCC Rcd at 4978 ¶ 8 (2004). Rather, the Commission determined that any use of the word at issue or a variation of that word, "in any context, inherently has a sexual connotation." *Id.*

[26] 478 F.2d 594 (D.C. Cir. 1973) ("*Yale Broadcasting*").

[27] *Yale Broadcasting,* 478 F.2d at 598 ("It is beyond dispute that the Commission requires stations to broadcast in the public interest. In order for a broadcaster to determine whether it is acting in the public interest, knowledge of its own programming is required.").

Moreover, the Commission specifically clarified that it was not banning the broadcast of "drug-oriented" songs.[28]

Banzhaf also cites *Office of Communication of the United Church of Christ v. FCC* ("*UCC*"),[29] and *Stone v. FCC* ("*Stone*").[30] He argues that these cases confirm the Commission's authority to deny renewal of a station's license based on the content it broadcast during its license term. But the circumstances of those cases are very different from those presented here. *UCC* involved allegations that a station had violated the Commission's now defunct fairness doctrine and otherwise failed to air programming that served the needs of its community. Nothing in that case suggests that the Commission could deny renewal of a broadcast license because particular words or programming broadcast by the licensee offended some viewers.[31] *Stone* noted that "such generalized criticisms [of a station's programming] run the risk of turning the FCC into a censorship board, a goal clearly not in the public interest."[32]

Banzhaf has not demonstrated that the Commission has ever denied renewal of a broadcast license based on the broadcast of programming or individual words that do not violate the Act or the Commission's rules. Given the First Amendment and Section 326 of the Act, and the Commission's repeated statements that its "role in overseeing program content is very limited,"[33] we decline to do so here.

Hate Speech. Banzhaf asserts that the term "Redskins" constitutes hate speech and incites violence against Indians.[34] There are no provisions in the Act or the Commission's rules banning hate speech. We have recognized that, under the principles enunciated in *Brandenburg v. Ohio* ("*Brandenburg*"), the Commission can take enforcement action based on broadcast speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[35] We will not do so, however, unless a local court of competent jurisdiction has determined that the speech

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[28] *Licensee Responsibility to Review Records Before Their Broadcast*, Memorandum Opinion and Order, 31 FCC 2d 377, 378-79 ¶¶ 4-6 (1971).

[29] 359 F.2d 994 (D.C. Cir. 1966).

[30] 466 F.2d 316 (D.C. Cir. 1972).

[31] Banzhaf also cites a subsequent decision related to this case. *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969). That decision too addressed the station's compliance with the fairness doctrine and, like the first court decision, did not address the Commission's authority to withhold renewal based on the airing of offensive content.

[32] *Stone,* 466 F.2d at 328-29.

[33] *See, e.g., AMFM Radio Licenses, L.L.C.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 10751, 10752 ¶ 4 (2004); *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1768, 1777 ¶ 16 (2004); *Saga Communications of New England, LLC*, Letter, 23 FCC Rcd 11008, 11010 (2008); *Infinity Media Corp.*, Letter, 23 FCC Rcd 1820, 1821 (2008); *The Greenwich Broadcasting Corp*., Letter, 23 FCC Rcd 1692, 1693 (2008).

[34] Banzhaf Objection at 12-13.

[35] *See Citicasters Licenses, L.P.*, Memorandum Opinion and order and Notice of Apparent Liability, 22 FCC Rcd 19324, 19331-32 ¶ 20 (MB 2007), *citing Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

at issue meets the *Brandenburg* test.[36] Here, Banzhaf has not proffered any evidence that a court has found broadcasting the word "Redskins" to meet the *Brandenburg* test.

Character Qualifications. In evaluating an applicant's character qualifications, the Commission considers misconduct which violates the Act or a Commission rule or policy.[37] The Commission also takes into account certain adjudicated non-Commission misconduct. The Commission generally considers only three types of non-Commission misconduct: felony convictions; fraudulent misrepresentations to governmental units; and violations of antitrust or other laws protecting competition.[38]

Banzhaf alleges that Snyder – and thus Red Zebra – lacks the character qualifications required of a Commission licensee. To support his claim, Banzhaf cites the Station's broadcast of the word "Redskins," which he characterizes as a "racist and derogatory term."[39] However, as discussed above, the broadcast of this word does not violate the Act or any Commission rule or policy. Further, Banzhaf has not offered any evidence of adjudications that the Station's broadcast of the word "Redskins" violates any other laws. Banzhaf also points to a newspaper article that accused Snyder of various transgressions.[40] Banzhaf does not proffer any evidence regarding these alleged non-FCC transgressions. In any event, Red Zebra rebutted Banzhaf's claims.[41] Accordingly, we find that Banzhaf has not established a prima facie case that Red Zebra lacks the character qualifications to be a Commission licensee.

Conclusion. We have evaluated the Application pursuant to Section 309(k) of the Act, and we find that the Station has served the public interest, convenience, and necessity during the most recent license term. Moreover, we find that there have been no serious violations of the Act or the Rules involving the Station or any other violations that, taken together, would constitute a pattern of abuse. In light of the foregoing, we will grant the Application and renew the Station's license.

Accordingly, IT IS ORDERED that the petitions to deny filed by John F. Banzhaf III, Louis Ramon Grimaldi, Jay Winter Nightwolf, and Verona Iriarte ARE DISMISSED and, when considered as

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[36] *See Spanish Radio Network*, Memorandum Opinion and Order, 10 FCC Rcd 9954, 9959 ¶¶ 21-22 (1995) (noting that "any determination that particular speech poses a 'clear and present danger of serious substantive evil' presupposes a familiarity with the circumstances, issues, and concerns of the community where such speech was heard, a familiarity which the Commission, in most cases, does not have and cannot practically obtain" and explaining that "[l]ocal authorities responsible for keeping the peace and enforcing the law are better positioned to know and assess the specific and unique circumstances in the ... community and, thus, to determine whether the *Brandenburg* test has been met")

[37] *See Policy Regarding Character Qualifications in Broadcast Licensing,* Report, Order, and Policy Statement, 102 FCC 2d 1179, 1190-91 ¶ 23 (1986) ("*Character Policy Statement*"), *modified*, Policy Statement and Order, 5 FCC Rcd 3252 (1990), *recon. granted in part*, Memorandum Opinion and Order, 6 FCC Rcd 3448 (1991), *modified in part,* Memorandum Opinion and Order, 7 FCC Rcd 6564 (1992).

[38] *Id.*

[39] Banzhaf Objection at 16. Banzhaf also claims that Snyder, who is also the majority owner of the Washington Redskins, forces other broadcasters to use the term. *Id.* at 17. This claim is unsubstantiated. Accordingly, we do not consider it further.

[40] *Id.* at 17.

[41] Red Zebra presented evidence that the publisher of the news article had disavowed the allegations made therein. Red Zebra Response at 22.

informal objections, ARE DENIED. IT IS FURTHER ORDERED that, pursuant to Section 309(k) of the Communications Act of 1934, as amended, the license renewal application of Red Zebra Broadcasting Licensee, LLC for Station WWXX(FM), Buckland, Virginia (File No. BRH-20110601ACB) IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau