



Federal Communications Commission
Washington, D.C. 20554

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Dear Counsel:

We here consider a complaint¹ from Susquehanna Radio Corp. (SRC) alleging that an officer of Kanza, Inc. (KI) violated the Commission's ex parte rules by soliciting an impermissible ex parte presentation. We find that KI's principal did not solicit a prohibited ex parte presentation in violation of the rules.

BACKGROUND

This allegation arises from a letter sent to the Commission by Representative Ike Skelton of Missouri,² regarding SRC's application for a license to cover the construction permit for FM translator station K279BI, Kansas City, Missouri.³ The letter attached an informational form provided by the Congressman's office, which had been filled out by KI's vice president, Miles Carter (Carter). In the form's narrative, Carter complained to the Congressman of interference by station K279BI to KI's station KRLI(FM), Malta Bend, Missouri, and asserted that the Commission's rules required K279BI to shut down. Carter indicates that he was seeking

¹ See Complaint, Request for Sanctions and Request for Disqualification, filed June 28, 2010, by Susquehanna Radio Corporation (Complaint).

² See Letter from Congressman Ike Skelton, 4th District, to Ms. Martha Johnson, [former] Director, [FCC] Office of Legislative Affairs (Jun. 10, 2010) (Skelton Letter).

³ This matter is File No. BLFT-20100309ABW.

Commission enforcement of this rule.⁴ Rep. Skelton's cover letter asked that Carter's request "be complied with, if possible."⁵

The Associate General Counsel on behalf of the Commission's Office of General Counsel (OGC) found that Representative Skelton's letter was a prohibited ex parte presentation, because by forwarding the form filled out by Carter, it addressed the merits of a restricted licensing proceeding and was not served on SRC.⁶ OGC indicated that the letter and attachment would be associated with but not made part of the record in the licensing proceeding and that it would not be considered in that proceeding.

EX PARTE COMPLAINT

SRC contends that Carter's actions violate 47 C.F.R. § 1.1210, which provides that "[n]o person shall solicit or encourage others to make any improper presentation under the provisions of this section." Based on the wording of Carter's narrative in the informational form, SRC alleges that Carter clearly intended that Representative Skelton would communicate with the Commission on the merits by seeking the result that Carter advocated and did not simply intend that Representative Skelton make a status inquiry.⁷ SRC asserts that KI's personnel were aware of the restricted nature of the proceeding and their obligations under the ex parte rules, as evidenced by their service of other documents on SRC.⁸ In SRC's view, this case is more egregious than a past case, *Elkhart Telephone Co.*⁹ in which the Commission assessed a \$5,000 forfeiture against a party for soliciting a congressional ex parte presentation. According to SRC, because KI ignored the Commission's warning to the public in *Elkhart* against soliciting prohibited presentations, KI not only should be assessed a substantial forfeiture, but also should have its complaints of interference against SRC dismissed. SRC suggests that dismissal would not harm the public interest, because members of the public can complain directly to the Commission if they experience interference from SRC's operations.

⁴ See Skelton Letter, Attach.. Carter stated that the specific nature of the action he was seeking is "to have the FCC enforce its own rules." *Id.*

⁵ See *id.* at 1.

⁶ See Letter from Joel Kaufman, Associate General Counsel to the Honorable Ike Skelton (Jun. 22, 2010). Under the ex parte rules, a presentation is a communication, including any attachments to a written communication, directed to the merits or outcome of a proceeding. See 47 C.F.R. § 1.1202(a). A written ex parte presentation is a written presentation not served on all parties to the proceeding. See *id.* § 1.1202(b)(1). Ex parte presentations are prohibited in restricted proceedings. See *id.* § 1.1208.

⁷ See Complaint at 4-5. Status inquiries are not considered presentations and are thus not subject to the restrictions of the ex parte rules with certain exceptions. See 47 C.F.R. § 1.1202(a).

⁸ See Complaint at 5 n.9.

⁹ *Liability of Elkhart Telephone Co., Notice of Apparent Liability for Forfeiture*, 11 FCC Rcd 1165 (1995).

KI responds that Carter's conduct does not warrant a serious sanction, because it involved, at most, a single, unintentional violation of the ex parte rules.¹⁰ KI accuses SRC of trying to divert attention from the underlying issue of interference to KI's station. KI denies that Carter intended to solicit an ex parte presentation by Rep. Skelton but only intended Representative Skelton to inquire as to the status of the proceeding, which might expedite Commission action.¹¹ KI asserts that Carter did not know the Representative Skelton would forward the informational form to the Commission and would have advised the Congressman to provide a copy to SRC if he had known that members of Congress routinely forward constituent inquiries to the Commission.¹² Thus, KI contends that this case is distinguishable from *Elkhart* in which a party supplied a Senator with the text of an ex parte letter to be sent to the Commission and therefore clearly expected a presentation to be made.¹³ Further, KI contends that Carter had no motive to hide KI's position, which had already been disclosed to the Commission and served on SRC, and would have provided to SRC a copy of the form attached to Representative Skelton's letter if he realized that it was required.¹⁴ In any event, KI asserts that no prejudice could result from the failure of Representative Skelton to serve the communication on SRC, inasmuch as SRC received Representative Skelton's communication before the Commission took any action to shut down SRC's station.¹⁵ Finally, KI asserts that the disqualification of a party for an ex parte violation is unprecedented and would harm the public, which has already complained to the Commission about interference.¹⁶

SRC replies that the wording of the form that Carter filled out for Representative Skelton reveals that Carter sought more than a mere status inquiry. SRC observes that Carter indicated that he was seeking "enforcement of the rules."¹⁷ SRC disagrees that dismissal of KI's interference complaints would be an excessive sanction. In SRC's view, past cases in which the Commission found that dismissal of a license application was too severe a sanction are distinguishable because dismissal of KI's complaint would not have the same devastating effect on KI that dismissal of an application would have had.¹⁸ SRC also disputes KI's claim that Representative Skelton's ex parte letter was not prejudicial. SRC points out that it had notice of

¹⁰ See Opposition to Complaint, filed July 7, 2010, by Kanza, Inc. (Opposition) at 1-2.

¹¹ See *id.* at 2, Attach. (Declaration of Miles Carter) at 2.

¹² See *id.* at 2-3, Attach. at 2.

¹³ See *id.* at 3.

¹⁴ See *id.* at 2.

¹⁵ See *id.* at 4.

¹⁶ See *id.* at 4-5.

¹⁷ See Reply to Opposition to Complaint, Request for Sanctions and Request for Disqualification, filed July 19, 2010, by Susquehanna Radio Corporation at 2.

¹⁸ See *id.* 2-3.

the letter only because the Office of General Counsel forwarded the letter to SRC, not because of any corrective action by KI.¹⁹ SRC maintains that this case is more egregious than *Elkhart*.²⁰

DISCUSSION

We find no clear evidence to support a finding that Carter violated 47 C.F.R. § 1.1210 by soliciting Representative Skelton's improper contact with the Commission. Under Rule 1.1210, Carter's compliance or non-compliance turns on whether Carter's intent in contacting Representative Skelton was to induce him to make an improper ex parte presentation.²¹ In this regard, the facts of this case are distinguishable from those of the *Elkhart* case, relied on by SRC. There, a party to a formal complaint proceeding sent a letter to Senator Nancy Kassebaum, asking her to "send a letter to [then] Chairman [Reed] Hundt to expedite the resolution of the complaint."²² The party attached a draft letter from Senator Kassebaum to Chairman Hundt that addressed the merits of the proceeding.²³ The Commission found that it was presumably the party's intention that Senator Kassebaum make use of the draft letter and that there was no indication that the party had an expectation that Senator Kassebaum would serve the other party to the complaint, although the party was familiar with service requirement of the ex parte rules.²⁴

In the present case, although Carter surely hoped that Representative Skelton would communicate with the Commission, we find plausible Carter's assertion that he did not intend to solicit a prohibited ex parte presentation. Carter stated that Representative Skelton's office asked him to fill out the information form and that, never having contacted a Congressman, he did not know that Representative Skelton would routinely forward the form to the Commission.²⁵ He further stated that "[h]ad I known that Congressman Skelton would be providing my form to the FCC and that provision of this form would be considered a presentation on the merits, I certainly would have advised Congressman Skelton to provide a copy to [SRC] as well."²⁶ We find these assertions credible, particularly given that KI has generally made a good faith effort to comply with the ex parte rules by serving the pleadings concerning its complaint on SRC.

¹⁹ See *id.* at 3-4.

²⁰ See *id.* at 5-6.

²¹ To "solicit" is to ask for the purpose of receiving. See *Erie Ins. Group v. Sears Corp.*, 102 F.3d 889, 894-95 (7th Cir. 1996) (citing definition in Black's Law Dictionary). It includes conduct calculated to incite the act of giving, even in the absence of a specific request. See *Meyer-Chatfield v. Century Bus. Servicing, Inc.*, Civil Action No. 05-3673 (E.D. Pa. 2010), reported at 2010 WL (3221938) at *5, *7 (citing definition in Black's Law Dictionary).

²² See *Elkhart*, 11 FCC Rcd at 1165 ¶ 4.

²³ See *id.* at 1165 ¶ 5.

²⁴ See *id.* at 1165 ¶¶ 5-6.

²⁵ See Opposition, Attach. at 2.

²⁶ See *id.*

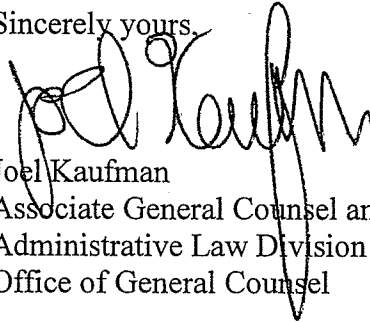
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This proceeding, moreover, is distinguishable from *Elkhart*, in which the party provided a draft letter addressing the merits of the restricted proceeding for use by Senator Kassebaum. Here, Carter did not indicate to Representative Skelton what form he intended Representative Skelton's contact with the Commission to take or what he wanted Representative Skelton to say. It would be unduly speculative to infer on these facts that Carter intended to cause Representative Skelton to make a presentation on the merits of the Commission proceeding, without serving it on SRC as required by the Commission's rules.

In view of the foregoing, we find no violation of the Commission's rules and we deny the Complaint.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Joel Kaufman". The signature is stylized and cursive, with a large initial "J" and "K".

Joel Kaufman
Associate General Counsel and Chief
Administrative Law Division
Office of General Counsel