

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

In the Matter of)
)
ENTERCOM PORTLAND LICENSE, LLC) EB-03-IH-0053
)
Licensee of Station KNRK(FM),) Facility ID # 51213
Camas, Washington)

MEMORANDUM OPINION AND ORDER

Adopted: November 20, 2003

Released: November 24, 2003

By the Commission:

I. INTRODUCTION

1. In this *Order*, issued pursuant to sections 0.459(g) and 1.115 of the Commission’s rules,¹ we deny the August 18, 2003, Application for Review filed by Entercom Portland License, LLC (“Entercom”),² licensee of Station KNRK(FM), Camas, Washington, which seeks Commission review of the Enforcement Bureau’s August 11, 2003, *Order*³ denying its request for confidential treatment of material broadcast over the station.

II. BACKGROUND

2. The Enforcement Bureau (“Bureau”) received a complaint that alleged that Entercom had broadcast material over Station KNRK(FM) on February 6, 2003, at approximately 3:30 p.m., in violation of the Commission’s rules restricting indecency.⁴ Upon review of the complaint, the Bureau staff determined that the complainant provided sufficient information to warrant an investigation. On May 28, 2003, the Bureau issued a letter of inquiry to Entercom, directing it to provide information concerning the broadcast, including recordings of the material identified in the complaint or otherwise broadcast over Station KNRK(FM) between 3:00 and 4:00 p.m. on February 6, 2003.⁵

¹ 47 C.F.R. §§ 0.459(g) and 1.115.

² See *Application for Review filed on behalf of Entercom Portland License, LLC by Brian M. Madden, Esquire, Dennis P. Corbett, Esquire, David S. Keir, Esquire, and Jean W. Benz, Esquire*, dated August 18, 2003 (“Application for Review”).

³ *Entercom Portland License, LLC*, 18 FCC Rcd 16386 (EB 2003) (“Bureau Order”).

⁴ See 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

⁵ *Letter from Maureen F. Del Duca, Investigations and Hearings Division, Enforcement Bureau, to Entercom Portland License, LLC (DE)*, dated May 28, 2003, (“letter”) at 4.

3. Entercom timely filed a response to the Bureau's letter that included a compact disc recording of the material that the station had so broadcast.⁶ The response also included a Confidentiality Request,⁷ which asked that the compact disc be "held confidential and not made available for public inspection" pursuant to section 0.459 of the Commission's rules.⁸

4. The Bureau subsequently issued an *Order* denying Entercom's Confidentiality Request, finding that Entercom had failed to demonstrate by a preponderance of the evidence a case for non-disclosure of the recording of its prior broadcast over Station KNRK(FM),⁹ as required by section 0.459 of the Commission's rules.¹⁰ Entercom timely filed its Application for Review of the Bureau's *Order* as required by section 0.459(g) of the Commission's rules.¹¹ Entercom argues that denial of its Confidentiality Request is defective both procedurally and as a matter of substantive law.¹² Specifically, Entercom contends that the Bureau exceeded its authority by requiring it to produce a recording of more programming than was referenced in the complaint.¹³ Thus, Entercom argues that its Confidentiality Request was necessary to prevent public disclosure of program material that had aired on KNRK(FM) while at the same time complying with the Bureau's directive.¹⁴ For the reasons set forth below, we reject Entercom's assertion that the Bureau erred by denying its Confidentiality Request, and therefore we deny its Application for Review.

III. DISCUSSION

5. The Commission's confidentiality rules are designed to protect against the disclosure of competitively sensitive material such as financial records, trade secrets and personnel records.¹⁵ Section 0.459 creates a procedure through which parties may request that

⁶ See *Letter from Brian M. Madden, Esquire, Dennis P. Corbett, Esquire, and Jean W. Benz, Esquire, Leventhal Senter & Lerman PLLC, to Investigations and Hearings Division, Enforcement Bureau*, dated July 11, 2003.

⁷ See *Memorandum from Brian M. Madden, Esquire, Leventhal, Senter & Lerman PLLC, to Investigations and Hearings Division, Enforcement Bureau*, dated July 11, 2003 ("Confidentiality Request").

⁸ See Confidentiality Request.

⁹ *Entercom Portland License, LLC*, 18 FCC Rcd 16387-88 at ¶¶ 4-8.

¹⁰ 47 C.F.R. § 0.459.

¹¹ 47 C.F.R. § 0.459(g).

¹² Application for Review at 1.

¹³ *Id.* at 2-3.

¹⁴ *Id.*

¹⁵ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order in GC Docket No. 96-55, 13 FCC Rcd 24816 (1998), *recon. denied*, 14 FCC Rcd 20128 (1999)("Confidential Treatment Order").

information or materials that they have submitted to the Commission not be made routinely available for public inspection. The rule requires that a party seeking confidentiality provide a statement of the reasons for withholding the materials in question from public inspection and set forth the specific categories of materials for which such treatment is appropriate.¹⁶ Entercom requested confidential treatment for recorded material broadcast over Station KNRK(FM) that was the subject of a complaint. However, Entercom failed to make the required showing under section 0.459. Under that rule, a party requesting confidentiality must demonstrate by a preponderance of the evidence that the material for which confidentiality is requested falls within one of the Freedom of Information Act (“FOIA”) exemptions.¹⁷ Entercom did not claim that the recorded material is “commercial or financial, or contains a trade secret or is privileged”¹⁸ or falls within any other FOIA exemption, nor could it. The courts and the Commission have consistently held that no claim of confidentiality may be made if material has already been made public.¹⁹ A recording of material broadcast over the air does not qualify for confidential treatment under the Commission’s rules because it has already been openly disseminated to the public.²⁰

¹⁶ 47 C.F.R. § 0.459(b). These categories reflect the exemptions from disclosure set forth in the FOIA, 5 U.S.C. § 552(b). Section 0.457 set forth categories of records that are not routinely available for public inspection, *i.e.*, accorded confidential treatment, and Section 0.459 sets forth the procedures for submitting requests that material or information be withheld from public inspection. For instance, Section 0.459(b)(3) provides that a request for confidentiality shall, among other things, include an “explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.” 47 C.F.R. §0.459(b)(3).

¹⁷ 47 C.F.R. § 0.459(d)(2).

¹⁸ 47 C.F.R. § 0.459(b)(3). *See, e.g., Letter to Mark J. Tauber, Esquire and Paul W. Jamieson, Esquire, Piper Rudnick, from Maureen F. DelDuca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 18 FCC Rcd 17644 (EB 2003)*(denying a request for confidential treatment pursuant to 0.459 where party seeking confidentiality failed to claim information is commercial or financial, contains a trade secret or is privileged).

¹⁹ *See Niagra Mohawk Power Corp. v. United States Dep’t of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1998)(Exemption 4 cannot be used to protect information already in the public domain); *Anderson v. HHS*, 907 F.2d 936, 952 (10th Cir. 1990); *Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures*, 17 FCC Rcd 17012, 17020, n.81 (2002).

²⁰ Entercom argues that the cases cited by the Bureau do not support its premise that Entercom placed the material at issue in the public domain because the party opposing disclosure does not have the burden to demonstrate this fact. Application for Review at 7-8. *See Entercom Portland License, LLC*, 18 FCC Rcd at 16388, n. 16, *citing Niagra Mohawk Power Corp. v. United States Dep’t of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1998). However, the Communications Act of 1934, as amended, defines “broadcasting” as “the dissemination of radio signals intended to be received by the public or by the intermediary of relay stations.” 47 U.S.C. § 153(6). *See National Association for Better Broadcasting v. Federal Communications Commission*, 849 F.2d 665, 671 (D.C. Cir. 1988). Thus, once broadcast and disseminated to the public, the material cannot be deemed confidential, regardless of which party bears the burden of proof. Indeed, the Commission has routinely released transcripts of broadcasts that are the subject of a complaint. *See, e.g., Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, to William McConnell, Assistant Editor, Broadcasting and Cable, and Stephen A. Hildebrandt, Vice President, Infinity Broadcasting Operations, Inc.*, dated November 20, 2002 (transcript and compact disc recording relating to an August 15, 2002, broadcast over WNEW(FM), including a pre-broadcast version of the material, released in response to FOIA request). Moreover, Entercom does not specifically challenge the Bureau’s citation to *Anderson v. HHS*, 907 F.2d 936, 952 (10th Cir. 1990), in which the court denied a claim of confidentiality for material published in medical journals.

Although subsection 0.459(b)(9) of the rules does, as Entercom argues, permit the submission of “other information that the party seeking confidential treatment believes may be useful in assessing whether confidentiality should be granted,” that subsection does not obviate the need to satisfy the other provisions of Section 0.459(b) and show that the material falls within one of the FOIA exemptions.”

6. Moreover, Entercom cannot justify a request for confidentiality by arguing that the Bureau exceeded its authority by directing Entercom to produce a recording of more material than was cited in the complaint.²¹ The scope of the Bureau’s authority to request the material has no bearing on whether the material in question is of a kind that is entitled to confidential treatment under the FOIA and the Commission’s implementing regulations. If Entercom objected to the scope of the Bureau’s directive, the appropriate legal recourse would have been to request a stay,²² but Entercom did not do so.

7. We also reject Entercom’s argument that the Bureau’s *Order* ruling on its Confidentiality Request was contrary to Commission precedent and unnecessary in the absence of any request for disclosure of the recorded material broadcast over Station KNRK(FM).²³ First, Entercom’s argument that the Bureau failed to strike the appropriate balance between “the concerns of the parties submitting information and the interest of the public in accessing information,”²⁴ omits the fact that this balancing test applies only when the material at issue meets the criteria for confidential treatment.²⁵ In this case, it does not. Moreover, although section 0.459 provides that a ruling upon a request for confidentiality may be deferred until a request for inspection has been made, the Bureau had full authority, within its discretion, to rule in the absence of such a request. The practice of deferring consideration of confidentiality requests is based upon considerations of administrative efficiency,²⁶ but the rule also contemplates that a ruling may be made even in the absence of a request for inspection.²⁷ Here, given the nature of Entercom’s request, we believe that it was appropriate for the Bureau to issue a ruling in order to establish precedent that will deter the filing of similar baseless requests in the future.

²¹ We find that once a complainant makes a *prima facie* case alleging the broadcast of indecent material, it is appropriate for the Bureau to seek from the licensee a tape or transcript not only of the material relevant to the complaint, but also of a reasonable amount of preceding and subsequent material, so that the full context of the material can be evaluated. *See, e.g., Infinity Broadcasting Operations, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 03-234, n. 38 (Oct. 2, 2003); *AMFM Radio Licenses, LLC*, FCC 03-233, n. 38 (Oct. 2, 2003).

²² *See SBC Communications, Inc.*, Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 7589, 7597 ¶ 19 (2002)(forfeiture paid).

²³ Application for Review at 3-4.

²⁴ Application for Review at 4.

²⁵ Entercom cites the *Confidential Treatment Order*, 13 FCC Rcd at 24824 ¶ 10 in support of its argument, but this text makes clear that the balancing test is applied to material that is entitled to confidential treatment. *See also, Paul D. Colford, The Daily News*, 17 FCC Rcd 2073, 2075 ¶ 8 (2002).

²⁶ *Confidential Treatment Order*, 13 FCC Rcd at 24854-55 ¶¶ 66-67.

²⁷ *Id.*

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to sections 0.459(g) and 1.115 of the Commission's rules, 47 C.F.R. §§ 0.459(g) and 1.115, that the Application for Review of filed on August 18, 2003, by Entercom Portland License, LLC is hereby DENIED.

9. IT IS FURTHER ORDERED, pursuant to section 0.459(g) of the Commission's rules, 47 C.F.R. § 0.459(g), that Entercom Portland License, LLC, has five (5) working days from telephone notice of this decision to seek a judicial stay of this decision. If Entercom seeks a judicial stay, the compact disc recording of the material broadcast over Station KNRK(FM) for which confidentiality is requested will be treated as confidential until the court acts on such a stay request.

10. IT IS FURTHER ORDERED that a copy of this *Order* shall be sent by facsimile and by Certified Mail Return Receipt Requested to counsel for Entercom Portland License, Brian M. Madden, Esquire, Leventhal Senter & Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1809 and by Certified Mail Return Receipt Requested to Entercom Portland License, LLC, 410 City Avenue, Suite 409, Bala Cynwyd, Pennsylvania 19004.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary