

F.C.C. 73-269

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LICENSEE RESPONSIBILITY TO EXERCISE ADE-
QUATE CONTROL OVER FOREIGN LANGUAGE
PROGRAMS

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1973; Released March 13, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. The Commission has before it a request of the National Association of Broadcasters (NAB) filed September 8, 1971 in accordance with Section 1.2 of the Rules for a Declaratory Ruling "concerning acceptable modes of station operation in the foreign language programming area."

2. NAB seeks clarification of the Commission's policies regarding licensee knowledge of and control over foreign language programming in light of the Commission's Public Notice of March 30, 1967, 9 RR 2d, 1901, the Commission's rulings in various individual cases, and particularly, the language of the Hearing Examiner in his Initial Decision in *Trans America Broadcasting Corp.*, 33 FCC 2d 606 (1970).

3. In the cited Public Notice we cautioned licensees to maintain adequate controls over foreign language programming, pointing out that in order to exercise such responsibility the licensee must have knowledge of the content of such broadcasts. We pointed out that certain procedures then being followed by some licensees were, in and of themselves, inadequate: i.e., permitting "only persons of established reputation for judgment and integrity to use their facilities; requiring submission in advance of English translations of copies of commercial announcements used in such programs; making recordings of all such broadcasts and retaining them "for future reference." We stated further that,

Licensee responsibility requires that internal procedures be established and maintained to insure sufficient familiarity with the foreign languages to know what is being broadcast and whether it conforms to the station's policies and to requirements of the Commission's rules.

Failure of licensees to establish and maintain such control over foreign language programming will raise serious questions as to whether the station's operation serves the public interest, convenience and necessity.

4. NAB contrasts this general language with a passage from the Hearing Examiner's Initial Decision in *Trans America*, *supra*, at p. 620:

In particular, there must be assurance that the licensee will exercise real control over the foreign language programs which are broadcast over its fa-

ilities. This control must encompass a systematic and regular pre-audit of all foreign language programs by a paid employee of the station who has demonstrated capability to understand the language involved.

NAB states that,

Several broadcast licensees have demonstrated to NAB that strict compliance with the FCC directive specified in the *Trans America* case effectively precludes continued broadcast of their foreign language programming and denies service to a significant segment of their audience which looks to this programming as their only real source of broadcast service. Yet, judged by a general standard of licensee responsibility for, and control over, programming, these licensees in the past have made more than scrupulous efforts to insure that their broadcasts in foreign languages are consistent with the public interest.

NAB does not deny "the clear responsibility of all licensees to maintain control over their programming," but it believes that "licensees fully aware and/or fully reminded of their duty with respect to specific subjects of programming are, in turn, fully capable on their own of establishing the appropriate and effective internal procedures demanded." NAB asserts that the propriety of the "self-determination" approach was recognized by the Commission itself in its *Report and Order* in Docket No. 18928, terminating a rule-making proceeding regarding telephone interview programs.

5. Petitioner contends that "several of the controls which the Commission has spelled out are really no controls at all; licensees are thus bound to implement a set of awkward and costly procedures which in fact still don't create any greater protection against programming problems." It asks what insurance there is that a person paid to monitor a foreign language program is any more or less trustworthy than the individual presenting the program, and states that "a thorough background check on a particular performer or announcer and a determination of his reliability is worth more than a routine hiring of someone who simply speaks the language in question" and that "This is all the more true when the performer or announcer is a *paid* station employee himself." NAB further states that the problem of program content "is evidenced more frequently in English programming than in programming presented in a foreign language." Accordingly, NAB believes "the Commission should relegate the matter of control over foreign language programming to the same general status of the well established treatment licensees are expected to give all programming . . ."

6. Specifically, NAB objects to a requirement that all foreign language programming be monitored or pre-audited by a paid employee with a demonstrated capability to understand the language involved. It believes "stations should be permitted to use their own regular employees in foreign language programming without the need for additional monitors." When a foreign language program is presented by a non-employee, NAB asserts use of a monitor should not be required (1) "where a thorough background check of the performing individual(s) has been undertaken, (2) the station is satisfied with his judgment and integrity and has apprised the person of the station's policies and the FCC requirements and (3) has received from the performer a certification that his presentation contains no improper material." If a background check is not possible or the FCC will not accept the above-proposed arrangement, NAB states that "a station

should be permitted to use as a monitor any individual with a demonstrated capability to understand the language involved, *whether he be a paid employee or not*, so long as he is of known good character, has been apprised of the station's policies and the requirements of the Commission's rules, and certifies as to the propriety of the foreign language broadcast which he has monitored." NAB concludes that,

Overall, a relaxation of the apparent Commission policy on foreign language programming control would return to the air a needed and highly valuable type of program matter upon which so many individuals newly arrived to this country depend.

DISCUSSION

7. We agree that a clarification of our policies in this area is desirable, in view of the apparent (and perhaps understandable) confusion among some licensees as to their responsibilities, and of some of the arguments set forth in NAB's petition—most particularly that as the result of some licensees' understanding of our requirements, broadcast service to persons unfamiliar with the English language has been seriously curtailed. It should be noted initially that we have never held or implied that foreign-language programming should be denied when a demonstrable need for it exists. Thus, the Review Board in *La Fiesta Broadcasting Co.*, 6 FCC 2d 65 (1965), found in a comparative proceeding that an applicant which proposed to broadcast all-Spanish-language programming was entitled to a preference in satisfying demonstrated needs over another which proposed only part-Spanish-language programming, on the basis of a showing of an unfilled need for Spanish-language programming. Moreover, as set forth in our *Programming Policy Statement*, 25 Fed. Reg. 7291, 7295, one of the major elements usually necessary to meet the needs of the community is "Service to Minority Groups," and from the earliest days of regulation the FRC and the FCC have commended broadcasters for foreign language programming designed to serve the needs of minority groups in their communities. *Johnson-Kennedy Radio Corp.*, (WJKS), Docket No. 1156, affirmed *sub nom F.R.C. v. Nelson Bros. Co.*, 289 U.S. 266, 270-71 (1933); *United States Broadcasting Corp.*, 2 FCC 208, 233 (1935).

8. The desirability of foreign-language program service does not, however, relieve the broadcaster of his responsibility for his programming, which in turn necessarily depends upon his adoption of reasonable procedures for assuring himself that the programming conforms to his policies and the requirements of the law. We cannot carve out in this area a special exception to licensee responsibility. Rather, our task is to set forth policies and to suggest certain procedures for implementation of them which will substantially assure exercise of licensee responsibility, while at the same time seeking to avoid imposition of unnecessary burdens.

9. We begin by reaffirming the general policy set forth in our Public Notice, *supra*, including our conclusion that certain procedures upon which some licensees were relying for knowledge of and control over foreign language programming appeared, in and of themselves, to be inadequate. For the same reasons, we must reject some of the contentions of the petitioner here: e.g., that a "background check" of a per-

former would assure licensee control and that letting a performer monitor his own program would be as efficacious as arranging for another party to monitor it. Nor do we agree with NAB that our termination of the proposed rule making in Docket No. 18928 is precedent for the requested relief sought. The proposed rules would not have required greater licensee knowledge of or control over what was being broadcast in telephone interview programs; rather, they would have required the licensee to obtain (but not broadcast) the names of persons who called in, and to retain such names, as well as recordings of the programs, for 15 days in order that they might be inspected or auditioned by "interested parties," e.g., persons attacked by anonymous callers.

10. Although we reaffirm our policy statement of 1967, we believe in light of NAB's petition and numerous inquiries the Commission itself has received as to interpretation of that statement, that amplification of it is in order. First, we disavow any requirement that every foreign language broadcast be pre-auditioned by a paid, outside monitor. In many cases, such programs are broadcast by regular employees of the stations—employees who are familiar with statutory requirements and the Commission's rules and policies on program matters, as well as the licensee's own policies, and who have demonstrated such knowledge to the licensee as well as their own responsibility. This does not mean, of course, that the licensee can disclaim responsibility for the content of such broadcasts by employees any more than he can disclaim responsibility for violations by his English-language announcers.

11. Moreover, we think that, so long as the licensee recognizes his responsibility for overall adherence to the statutes, rules and Commission policies, and has fully familiarized those using his facilities with them and station policies, the licensee could conclude that he need not engage an outside monitor to listen to and report on every broadcast by a non-employee in a language with which no employee of the licensee is familiar.¹ Unless the licensee has reason to suspect that the non-employee is violating the requirements of the licensee and the Commission, he may, for example, arrange for an outside monitor to listen to, and report to the licensee on such broadcasts on a spot basis, choosing broadcasts at random—for example, one or more broadcasts a week of a daily program and one or more a month of a weekly program. It is, of course, assumed that the outside monitor has been made familiar with the licensee's policies and the Commission's requirements with respect to programming: e.g., obscenity, personal attacks, the fairness doctrine, broadcast of false or misleading advertising, lottery information, fraudulent schemes, equal opportunities for political candidates, the licensee's limitations on total commercial content, sponsorship identification. On the other hand, a licensee could reasonably conclude that more stringent precautions are required to carry out his public trust.

12. As for NAB's contention that there is no assurance that a person paid to monitor a program is any more trustworthy than the individual presenting the program, we believe it is obvious that a third

¹ If any responsible employee of the licensee understands the language and monitors the programs of non-employees, there obviously is no need to engage outside monitors.

party, independent of the performer and responsible only to the licensee, is likely to be a more reliable source of information regarding violations than the performer himself. Many foreign-language programs are broadcast by independent time-brokers, who buy time in blocks from the station, sell their own advertising, and produce their own programs. Thus, there may be a basic conflict of interest between the time-broker's tendency to increase his income by accepting false or misleading commercials, for example, and his duty to observe the Commission's and the licensee's policies. Similarly, the Commission has discovered over the years many instances in which time-brokers were devoting more of their broadcast time to commercials than the licensee's policy permitted; also, instances in which brokers have sold time to competing political candidates at different rates, or at higher than regular commercial rates, in violation of the statute and the Commission's rules. Thus, mere reliance on a foreign-language broadcaster who is not a station employee to report his own violations to the licensee obviously would not be likely to assure licensee exercise of his responsibilities.

13. NAB also apparently objects to a condition that outside monitors be paid. We will not lay down a flat requirement that the monitors be paid, but it has been our experience in many cases that where monitors are not paid by the licensee they do not regularly monitor and report on the programs; in fact, in most cases coming to our attention, the device of unpaid, voluntary monitors has proved to be a sham. We do not rule, however, that there may not be circumstances in which an unpaid monitor would serve as efficiently and responsibly as one who is paid. We merely point out that it is the licensee's responsibility to assure that his and the Commission's requirements are complied with in his programming, and that if unpaid monitors are used, the licensee should take special precautions to assure himself that his purpose in engaging a monitor is being fulfilled.

14. In the foregoing paragraphs, we have suggested some guidelines for the licensee, and have tried to make clear that although some procedures have proven inadequate for that purpose, we do not intend to lay down any rigid formula for achievement of it. It is clear that a licensee cannot insure operation in the public interest unless he has a familiarity with the content of his programs; for example, he cannot provide suitable access to ideas, opinions and information of public importance if he has no such familiarity, nor can he comply with the fairness doctrine, personal attack rules, or any of the other requirements of the statute or the Commission's rules and policies. However, as we stated in *Wolfe Broadcasting Corp.*, 32 FCC 2d 761, 763 (1971):

[W]e believe it would be administratively impossible to determine for each licensee who presents foreign language programming, whether or not the internal procedures he has implemented to exercise proper control are "required," unnecessarily stringent, or "reasonable" in light of all the factors involved. Certainly the individual licensee is in a far better position than we to assess his problems and requirements in this area. Again, we state that, absent substantial extrinsic evidence of intentional abuse, our only legitimate concern can be whether the procedures followed allow a broadcaster to maintain sufficient control over his programming.

15. Thus, while again reminding licensees of their responsibility in this matter and pointing out some methods of exercising this respon-

sibility which have in our experience proved effective and others which have proved ineffective, we still leave to the licensee the determination of what particular procedures are in his case necessary to the exercise of proper control over programming.

16. Accordingly, the request of the National Association of Broadcasters is to the extent reflected above GRANTED and, in certain respects, as also indicated above, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.