Advertising, Program-Length Commercials

Petition denied for reconsideration of the Commission's letter rulings that station-conducted programs devoted to sale of station's goods by auction constitute program-length commercials.

FCC 78-469

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Petition for Reconsideration of Rulings on Auction Programs As Program-Length Commercials

MEMORANDUM OPINION AND ORDER

(Adopted: June 28, 1978; Released: July 12, 1978)

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

1. On July 16, 1975, the Commission adopted By Direction letters[1] to Silver City Broadcasting Corporation (WPEP), James R. Lang (WEIR), and Samuel Miller, Esq. Based upon the description of the program presented for ruling in each case the Commission ruled that the auction program constituted a program-length commercial and consequently that the entire duration of the program should be logged as commercial matter.

2. The significant features of the typical auction program are as follows:[2]

(a) Continuous sale of articles owned by the station, broadcast from 15 minutes to one hour or more.
(b) The name or business location of the merchant from whom the article was obtained may or may not be mentioned.
(c) At the time that the article is offered for bids the article is described and "sales talk" is made to enhance the bidding.
(d) The auctioneer and the bidders may engage in incidental banter concerning the article up for bid or other matters.
(e) The proceeds of the sales are retained by the station as revenue.

[1] These letters are reported at 54 FCC 2d 1005, 54 FCC 2d 966, and 54 FCC 2d 935, respectively.

[2] All of the formats presented for the July 16, 1975 rulings conformed to this outline.

3. A petition for reconsideration of the aforesaid rulings has been filed by Haley, Bader & Potts, Washington, D.C. legal counsel, on behalf of the broadcast licensees represented by that firm. The petitioner states that auction programs do not subordinate the public interest in programming to an interest in the salability of the sponsor's products. The contention is that the "salability interest" is absent for the following reasons:

(a) The broadcast does not promote the sale of articles—it sells them—and the descriptions of the articles made at the time they are offered for bids are not "advertising *per se*, but rather the mere attempt to obtain a sale" of the articles. The actual sale of the articles constitutes the entertainment value of the program. Therefore there is no interweaving of commercial and non-commercial matter because the making of the sale and the entertainment are one and the same.

(b) In its July 16, 1975 rulings the Commission stated that the station itself was the sponsor since it received all of the proceeds from the sales. This appears to be inconsistent with the sponsorship provisions of Section 317 of the Act in that "sponsorship" under that Section is directed to consideration received by the station in return for the sale of broadcast time. There is no sale of broadcast time involved in the auction program. It is physically impossible for a station to furnish consideration to itself.

(c) Such programs are ordinarily broadcast during one or two hours out of a potential broadcast week of 168 hours, accounting for between .6% to 1.2% of a station's total broadcast hours.

4. The petitioner's argument is directed, for the most, to the language used in the Commission's policy statement of January 31, 1974 on the *"Applicability of Commission Policies on Program-Length Commercials,"* 44 FCC 2d 985, 29 RR 2d 469. Admittedly, neither that policy statement nor the Commission's Public Notice of February 22, 1973 (39 FCC 2d 1062, 26 RR 2d 1023) is expressly devoted to the situation where a station uses its broadcast time to conduct a sale of some of its assets. However, both Commission statements clearly advised licensees that the examples of program-length commercials set forth therein were not intended to be all-inclusive. The 1973 Notice stated:

> However, the examples are by no means all-inclusive, and licensees should not conclude that the fact that a program employs a different format will necessarily cause it to comply with Commission policies and rules.

Although many examples were set forth in the 1974 statement, the Commission stated:

> Moreover, it would be impractical, if not impossible, to formulate rulings in advance regarding every conceivable type of program.

5. From the inception of the Commission's policy on program-length commercials, the usual type of format presented for ruling was designed to promote the sale of something under the guise of informational or entertainment programming. While in some cases there was no formal advertising, the typical case did contain informational or entertainment matter which was interwoven with or cross-referenced to matter promoting the sale. Interweaving is a technique used in some formats, but not all. The petitioner here points out that there is no interweaving in the auction program, contending that the lack of it negates a program-length commercial. Of course, this contention is without merit in light of Commission precedent. In *WUAB, Inc.*, 37 FCC 2d 748, 26 RR 2d 137 (1972) it was held that a program-length commercial would exist if the station broadcast a 60-minute television program displaying and describing the attributes of homes for sale, one after another continuously, with the names of the real estate brokers to be contacted. Similarly, see *Multimedia, Inc.*, 25 FCC 2d 59 (1970) and *KCOP-TV, Inc.*, 24 FCC 2d 149 (1970). These three cases are also squarely responsive to petitioner's argument that the auction program has a high entertainment value which make it "programming in the public interest." The essence of that argument is that having such a separate and distinct value makes the continuous sale of the articles somewhat less commercial. Identical arguments were made in the cited cases involving great music, the value of speed reading, and the convenience afforded to potential home buyers. In each case the Commission rejected the arguments for the reason that the dominant purpose of the program was to sell. So it is with the typical auction program in which the articles owned by the station are continuously knocked down to bidders and where the incidental banter or the course of the bidding itself may have entertainment value to some listeners. The Commission is unable to see any grounds for distinguishing the subject auction programs from the programs ruled upon in the cited cases.

6. As indicated above, petitioner's other principal contention relates to Section 317 of the Communications Act of 1934, as amended. This contention is not clear; petitioner refers to the statement made in all of the July 16 By Direction letters to the effect that since the station receives the proceeds of each sale, the station itself must be considered to be the sponsor of the program. The contention is that "Section 317's concern with sponsorship is directed to consideration furnished a station in return for the broadcast of matter, or essentially, in return for the sale of broadcast time." We observe that Section 317 does not use or define the word "sponsor." We believe that, when a station conducts an entirely commercial program to obtain cash revenue for the station by the sale of its goods, a determination that

the station itself is the sponsor is appropriate and in the public interest.[3]

7. Petitioner seeks to distinguish the auction program from all other types involved in cases wherein the Commission has found the program to constitute a program-length commercial. The basis of distinction set forth by petitioner is that the auction program does not advertise the sale of, or promote the sale of, the articles which are offered for bid; consequently, any description of the articles made at the time of the offer is similar to a "product mention" to which the *proviso* of Section 317(a) of the Act is devoted.[4] The language of the *proviso* clearly has no applicability to the facts under consideration. We also reject the petitioner's position, in substance, that, there being no advertising or promotion of the sale of articles—simply a sale of the articles—there is no commercial announcement, no commercial continuity and no commercial matter of any kind; and that all references to the articles are "the mere attempt to obtain a sale of" the articles. This contention ignores the basis concept of commercialism; the Commission knows of nothing more commercial than the conduct of a sale.

8. Petitioner requests that the Commission articulate its views on the fact that the auction programs ordinarily are broadcast but one or two hours weekly, which is a small part of the broadcast week. In response, it may be said that a relatively infrequent failure to abide by the Commission's policies and rules does not make it less of a failure. See *Kaiser Broadcasting Co.*, 45 FCC 2d 344, 29 RR 2d 460 (1974).

9. In view of the foregoing, the Commission finds that petitioner's contentions are without merit and IT IS ORDERED, That the petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

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[3] Petitioner's statement that it is physically impossible for a station to furnish consideration to itself does not assist its argument that this type of program is not commercial. The Commission has ruled that announcements are commercial when a station uses its air time to derive a direct or indirect consideration from the broadcast of the announcements. *Letter to American Broadcasting Cos., Inc.*, FCC 69-1047, 17 RR 2d 1104 (1969), citing a similar ruling made by letter to KFOX, Inc., of November 9, 1966, FCC 66-998.

[4] The *proviso* appears in Section 317(a)(1) of the Act and reads as follows:

> *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.