

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

In the Matter of)	
)	
SAGITTARIUS BROADCASTING CORP.)	File. No. BRH-19980202X6
)	
Application for Renewal of License)	
WXRK(FM), New York, New York)	
Facility ID #58579)	

MEMORANDUM OPINION AND ORDER

Adopted: October 8, 2003

Released: October 30, 2003

By the Commission: Commissioner Copps dissenting and issuing a statement.

1. The Commission has before it a March 23, 2001, Application for Review from Al Westcott (“Westcott”), a resident of Ojai, California.¹ Westcott filed a petition to deny the license renewal application of station WXRK(FM), New York, New York, based on the station’s origination of a radio show containing allegedly indecent material. Westcott is able to hear the show on station KLSX(FM), Los Angeles, California which receives the program via satellite.² The staff renewed WXRK’s license after fully considering Westcott’s submission as an informal objection.³ The staff dismissed Westcott’s petition for reconsideration based on the principle that informal objectors are not parties in interest and thus have no standing to seek reconsideration.⁴ On review, Westcott alleges that the staff erroneously treated him as an informal objector and should have accorded him standing as a “listener” of the New York station. We disagree. Westcott fails to establish standing because he is a listener of his local California station, not of station WXRK, New York, New York, and fails to demonstrate that Californians like himself are aggrieved by renewal of the distant station’s license. Accordingly, we affirm.

I. BACKGROUND

2. Westcott claims an interest in WXRK(FM) based on the station’s origination of “The Howard Stern Show” (“Stern Show”), which he argues has included multiple broadcasts of indecent material in violation of 18 U.S.C. Section 1464. Westcott maintains that he should be considered a WXRK listener

¹ The station’s licensee, Sagittarius Broadcasting Corporation, filed an Opposition on April 9, 2001. Shortly thereafter, on April 30, 2001, it consummated an assignment of the station’s license to Infinity Broadcasting Operations, Inc., as had been approved by the staff on April 6, 2001. Westcott filed a Reply on April 18, 2001.

² KLSX, which was licensed to CBS Broadcasting at the time of Westcott’s petition, is currently licensed to Infinity Broadcasting Corp. As discussed in note 26 *infra* these companies are related to WXRK’s licensee.

³ *Letter from Chief, Audio Division to Al Westcott*, Ref. No. 1800B3-TSN (MMB Oct. 19, 2000).

⁴ *Letter from Chief, Audio Division to Al Westcott*, Ref. No. 1800B3-TSN (MMB Feb. 15, 2001).

with standing to challenge grant of the station's license renewal application because WXRK transmits the Stern Show to other stations, including station KLSX in Westcott's listening area.⁵ Westcott submitted Stern Show transcripts allegedly supporting his indecency claim, all deriving from material heard on stations other than WXRK.⁶ The staff has previously found some of this material actionably indecent with respect to other stations, with resulting enforcement actions such as monetary forfeitures.⁷ The Commission has considered additional material submitted by Westcott in other contexts, finding no actionable indecency.⁸ Westcott believes that the staff should aggregate complaints made against individual stations carrying the Stern Show, and consider those complaints against WXRK's license renewal application because WXRK is the Stern Show's "flagship" station.

3. The staff found Westcott without standing to challenge WXRK's license renewal application. It determined that Westcott neither lives within WXRK's service area nor demonstrates that he actually listens to broadcasts on WXRK. The staff nevertheless considered the merits of Westcott's pleading as an informal objection.⁹ It determined that Westcott had not raised any substantial and material questions under the applicable standards for license renewal.¹⁰ The staff observed, for example, that there was no evidence that the allegedly indecent material at issue was actually broadcast over WXRK. The staff reasoned that because WXRK had instituted independent editing of the Stern Show from November 20, 1996, onward, WXRK was able to independently excise indecent material from its broadcasts of the Stern Show, thereby negating a previous presumption that all Stern Show material heard on other stations also aired on WXRK.¹¹ The Commission noted the staff's approval of the WXRK renewal application when

⁵ Westcott accords significance to the California station's scheduling of the Stern Show at the same time as its New York airing, beginning about 3:00 a.m. Pacific Time. Westcott maintains that he is thus no different from a listener in New York hearing the show at 7:00 a.m. Eastern Time. Westcott does not take into account independent editing by the New York and California stations. Nor does he recognize that a 3 a.m. California broadcast would fall within the Commission's 10 p.m. to 6 a.m. "safe harbor" for indecent material, unlike a 7 a.m. New York broadcast. *See Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996).

⁶ Nor did the material appear to come from Westcott's local station, KLSX, Los Angeles. To the extent that the staff could ascertain the origin of the material submitted, the broadcasts were heard over stations in one of the following communities: Richmond, Virginia; New Orleans, Louisiana; Fort Worth, Texas; Montreal, Canada; or Toronto, Canada. The material made in complaints against the U.S. stations had been considered previously.

⁷ *Letter to WVGO License Limited Partnership*, 11 FCC Rcd 13214 (MMB 1996); *Letter to EZ New Orleans, Inc.*, 12 FCC Rcd 4147 (MMB 1997). *Cf.*, *Policy Statement, Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcasting Indecency*, 16 FCC Rcd 7999, 8004 (2001) (summary of indecency cases includes one Stern Show broadcast by a Philadelphia station).

⁸ *Shareholders of CBS Corporation*, 15 FCC Rcd 8230, 8242 (2000), *recon. denied*, 16 FCC Rcd 16072.

⁹ *See* 47 C.F.R. § 73.3587.

¹⁰ *See* 47 U.S.C §§ 309(d)(2) and (k). Pursuant to Section 309(k), the Commission shall grant an application for license renewal if, during the preceding license term, the station has served the public interest, the licensee has not had serious rule violations at that station, and there has been no pattern of abuse at that station.

¹¹ *Cf. Letter to CBS Radio*, 12 FCC Rcd 8274 n.3 (MMB 1997) (finding that Stern Show excerpts heard on other stations prior to November 1996, also would have aired on WXRK). The staff's initial decision credited Sagittarius's statement that "before the Stern Show is broadcast over WXRK, the version of the Stern Show which is delivered by satellite [to other stations] is subjected to separate editing that is unique to WXRK." The staff also (continued....)

it approved subsequent transfer applications by the station's parent company, which were opposed by Westcott based on similar evidence.¹² Westcott filed a petition for reconsideration of the renewal decision, which the staff dismissed for lack of standing. Westcott maintains that the staff erred in finding him without standing. The threshold issue presented on review is whether a person has standing in a Commission proceeding to challenge the renewal of a distant station's license if he is a listener of a local station that broadcasts a version of the distant station's originally produced programming.

II. DISCUSSION

4. The Commission recognizes the value of broad-based participation in its proceedings, on either a formal or informal basis. We provide an opportunity for the public to file informal objections against initial applications and accept informal complaints so that people who do not satisfy the requirements for formal participation may nevertheless bring useful information to our attention.¹³ Moreover, we require broadcast stations to make on-air announcements before and after the filing applications for license renewal, to inform the community of the opportunity to file formal petitions or informal comments.¹⁴ The staff considers all such submissions, whether formal or informal, prior to making an initial decision. However, a person generally does not have standing to seek further redress thereafter unless he was a formal participant at the initial stage.¹⁵

5. Formal participation at the initial stage of a license renewal proceeding is accomplished by filing a complete and timely petition to deny that demonstrates the petitioner's standing.¹⁶ Specifically, Section 309(d)(1) of the Communications Act of 1934, as amended ("Act"), implemented by Section 73.3584 of the Commission's rules, provides that a person filing a petition to deny must demonstrate that he or she is a "party in interest."¹⁷ Similarly, Section 405 of the Act, implemented by Section 1.106 of the Commission's rules, requires that a person seeking reconsideration must have qualified as a "party" during the previous stages of the proceeding, or demonstrate that he is "aggrieved" or "adversely affected" by the decision.¹⁸ In broadcast proceedings, alleged injury to a petitioner often arises from the petitioner's interests as a member of the listening public rather than from any individual economic harm.¹⁹

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found that it could not consider some of the material due to the terms of a settlement agreement between the Commission and Sagittarius' parent company. *See Sagittarius Broadcasting Corp.*, 10 FCC Rcd 12245 (1995).

¹² *Shareholders of CBS Corp.*, 16 FCC Rcd 16072, 16073 (2001).

¹³ *See generally* 47 C.F.R. §§ 73.3587 and 1.41.

¹⁴ 47 C.F.R. § 73.3580(d).

¹⁵ 47 C.F.R. § 1.106(b)(1) (non-party cannot seek reconsideration absent a showing "with particularity the manner in which the person's interests are adversely affected by the actions taken," and of a good reason why it was not possible for him to participate earlier as a party).

¹⁶ *See* 47 C.F.R. § 73.3584(a).

¹⁷ 47 U.S.C. § 309(d)(1); 47 C.F.R. § 73.3584(a).

¹⁸ *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106(b)(1).

¹⁹ *Cf. Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1001 (D.C. Cir. 1966) (standing is accorded in agency proceedings to protect the public interest as well as private interests). The Commission also has long recognized the interests of competing broadcasters and of those receiving electronic interference. *Id.*

A member of the public can thus establish standing in Commission broadcast proceedings by demonstrating either (1) that the petitioner is a resident of the station's service area, or (2) that the petitioner is a station listener or viewer whose contact with the station is not transient.²⁰ In this manner the Commission recognizes that broadcasters are responsible for serving the needs of residents within their service areas and that people who listen to a station on a regular basis, unlike transients, have legitimate interests in the station's performance.²¹

6. We agree with the staff that Westcott is not a party, but rather an informal objector without standing to seek reconsideration of the staff's decision. Westcott demonstrates neither residence within WXRK's service area nor a non-transient listener/viewer relationship with WXRK.²² Westcott resides over 3,000 miles from WXRK's service area, on the opposite coast of the United States. He claims no direct contact with station WXRK. Westcott is a listener of his local California station, not of the New York station whose license renewal is under consideration here.

7. Westcott's interest in the current proceeding is far more tenuous than other professed "listener" interests that the Commission has found too minimal to confer standing. For example, the Commission has found that travelers who listen directly to a station's broadcast signal when visiting a station's community of license lack standing.²³ Part-time residents of areas outside of a station's protected service contour who can sometimes receive the station's signal also lack standing.²⁴ Such individuals are considered to have contacts of a transient nature because they are not capable of receiving

²⁰ See *Curators of University of Missouri*, 16 FCC Rcd 1174 (2001); *CHET-5 Broadcasting, L.P.*, 14 FCC Rcd 13041 (1999). Cf. *NAB Petition for Rulemaking*, 82 FCC2d 89, 98-99 (1980), as modified by *Maumee Valley Broadcasting, Inc.*, 12 FCC Rcd 3487 (1997) (historical development of the standard). Our administrative standard for broadcast standing is less stringent than the judicial standard applied to petitioners appealing Commission decisions in federal court. See *Rainbow/PUSH Coalition*, 330 F.3d 539 (D.C. Cir. 2003), petition for reh'g denied September 10, 2003. (organization representing members residing within a broadcast station's community nevertheless did not satisfy court's requirements for standing because the organization did not also connect the station's alleged violation to a public injury-in-fact). Judicial standing requirements are stricter because the jurisdiction of federal courts is based on Article III of the U.S. Constitution, whereas administrative standing is a matter committed to agency discretion. See *CAPH v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985) ("The Article III restrictions under which this court operates do not, of course, apply to the FCC. The Commission may choose to allow persons without Article III 'standing' to participate in FCC proceedings, as it did in this case."); *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 732 n.27 (D.C. Cir. 1970). ("[S]tanding to sue [d]epends on more restrictive criteria than standing to appear before administrative agencies . . .").

²¹ See *CHET-5 Broadcasting, L.P.*, 14 FCC Rcd at 13042.

²² The staff, while dismissing the petition for reconsideration procedurally based on this lack of standing, also noted that it would have found no merit to Westcott's substantive arguments. Because we uphold the staff's primary finding, we need not reach its secondary conclusions. Specifically, we decline to address substantive arguments in the Application for Review, including: (1) whether Westcott's allegations against WXRK were sufficient to make a *prima facie* case of rule violation; (2) whether Westcott's allegations were sufficient to call into question whether license renewal would be consistent with the public interest, convenience, and necessity; (3) whether the staff's enforcement of Commission rules is inadequate or discriminatory; and (4) whether an inquiry on the Commission's own motion pursuant to 47 U.S.C. § 403 would have been appropriate.

²³ See *Maumee Valley Broadcasting, Inc.*, 12 FCC Rcd 3487 (1997); *National Broadcasting Co., Inc.*, 11 FCC Rcd 10779 (1996); *Mutual Radio of New York*, 1 FCC Rcd 384 (1986).

²⁴ See *National Broadcasting Co., Inc.*, 11 FCC Rcd at 10780.

the station's full offerings on a regular basis.²⁵ In the present case, Westcott has not shown even transient contacts with WXRK. Westcott cannot receive WXRK's broadcast signal but merely one WXRK-produced program, which a distant station, KLSX, procures by non-broadcast means for delivery to its own listeners and which does not reflect the WXRK-unique editing of the program that is heard only in New York.

8. Westcott also claims that he has standing to challenge the broadcast practices of WXRK because that station is under common ownership with KLSX.²⁶ Congress, however, has expressly limited the scope of the license renewal inquiry to matters occurring at the particular station for which license renewal is sought.²⁷ Accordingly, KLSX programming cannot be considered in determining whether grant of the WXRK renewal application is in the public interest.²⁸ We conclude that the staff correctly limited its review to potential rule violations at WXRK(FM).

9. As a KLSX listener, Westcott's direct concern is with that station's programming policies, not with WXRK's authorization to continue broadcasting to audiences in New York. An informal objector may appropriately bring an initial challenge to an application filed by a distant station, but does not become a listener/viewer of the distant station or otherwise aggrieved by virtue of receiving local broadcasts of one of that station's programs. Accordingly, such persons lack standing to seek redress beyond the initial staff decision.

10. As Westcott made no showing of being "aggrieved" by the renewal of WXRK's license, he has not shown that he is "aggrieved" for purposes of this application for review.²⁹ Accordingly, IT IS ORDERED that the Application for Review filed on March 23, 2001, by Al Westcott IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁵ As we have long stated, the Commission's primary concern at license renewal time is with the licensee's overall performance in serving the needs of its community. *See Pacifica Foundation*, 36 F.C.C. 147 (1964). A transient is not in a good position to comment on a station's overall performance to the community.

²⁶ The two stations have had a common parent, both at the time of the complaint and currently.

²⁷ *See* 47 U.S.C. § 309(k)(1) ("the Commission shall grant the application if it finds, *with respect to that station . . .*") (emphasis added). This provision was added by the Telecommunications Act of 1996.

²⁸ *See generally Broadcast and Cable Equal Opportunity Rules and Policies*, 15 FCC Rcd 2339, 2451 n. 91 (2000) (Section 309(k)'s renewal standard is narrower than the general public interest renewal standard used prior to the 1996 enactment of Section 309(k)). *Public Notice, Media Bureau Announces Certain Revisions to Instructions to Form 303-S - - Application for Renewal of License for Broadcast Stations*, 18 FCC Rcd 8986 (MB 2003) (question about violations on license renewal application pertains only to the station for which the renewal application is being submitted).

²⁹ *See* 47 C.F.R. § 1.115(a); *Alaska Native Wireless, LLC*, 18 FCC Rcd 11640 (2003).

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: SAGITTARIUS BROADCASTING CORP. Application for Renewal of License WXRK(FM), New York, New York, Facility ID #58579

In this Order, the Commission dismisses on procedural grounds an application for review seeking to deny a radio station's license renewal application based on allegations that the station aired indecent material. In this case, a citizen who lives in California sought to deny the license renewal of KLSX(FM), a station in Los Angeles that broadcast the Howard Stern Show. This person also sought to deny the license renewal application of WXRK(FM) in New York, the station that originated the Stern Show. The Bureau dismissed the objection against KLSX(FM) because this person relied on printed excerpts from the show and therefore did not demonstrate knowledge that the program actually aired on KLSX(FM). The Bureau dismissed the challenge to WXRK(FM)'s application concluding that he did not prove the material had actually been broadcast on WXRK(FM). In both cases, the Bureau apparently made no effort of its own to ascertain the facts of the broadcast. Additionally, the Bureau decided that, because the complainant lives in California, he lacks standing to challenge the license renewal of a New York station. In today's Order, the Commission upholds the Bureau's decision with respect to WXRK(FM).

I find the majority's decision troubling, especially as we enter a new license renewal cycle this fall. It is the Commission's affirmative responsibility under the statute to determine whether a broadcaster is serving the public interest and deserves to have its license to use the public's airwaves renewed. Unless a citizen or some other outside party complains, licenses are almost automatically renewed. The message from today's decision is that, even when the public raises issues, this agency will look for procedural vehicles to avoid our substantive responsibility to ensure that a licensee is serving the public interest.

The process by which the Commission carries out its statutory duty places inordinate responsibility upon the complaining citizen. That's wrong. It is the *Commission's* responsibility to examine whether a station is serving the public interest. I hope we will do better in the upcoming license renewal cycle.