



Federal Communications Commission  
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Mr. Thomas Irion  
P.O. Box 1244  
Capitola, CA 95010

Ms. Carol Stafford  
Zwerling Broadcasting System  
2300 Portola Drive  
Santa Cruz, CA 95062

In re: KSCO, Santa Cruz, CA  
Facility ID No. 41594  
Zwerling Broadcasting System Ltd.  
File No. BR-20130809AAJ

Application for Renewal of License

**Informal Objection**

Dear Mr. Irion and Ms. Stafford:

This letter refers to: (1) the referenced application (“Application”) of the Zwerling Broadcasting System (“Licensee”) to renew its license for AM Station KSCO, Santa Cruz, California (“Station”); and (2) the Informal Objection (“Objection”) to the Application filed by Thomas Irion (“Irion”). For the reasons discussed below, we will treat the Objection as a petition for reconsideration and dismiss it.

**Background.** On August 9, 2013, Licensee filed the Application to renew the license for AM station KSCO in Santa Cruz, California. The staff granted the uncontested Application on November 22, 2013.<sup>1</sup> Irion then filed the Objection to the Application on December 23, 2013.

In his Objection, Irion alleges that the Station does not operate in the public interest because: (1) hosts on the Station “openly advocate criminal behavior, specifically, the use and abuse of illegal drugs”;<sup>2</sup> and (2) the Station owner Michael Zwerling (“Zwerling”) “engages in anti-social behavior on the air,” verbally bullying callers, guests, and his own mother, a contributor to the Station.<sup>3</sup> To support his first claim, Irion cites a specific instance when the morning show hosts allegedly broadcast “the recipe for preparation [of] a substitute form of ‘Meth.’”<sup>4</sup> In support of the second claim, he recounts a program discussing the dangers of electromagnetic radiation, in which Zwerling allegedly verbally abused a

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<sup>1</sup> The Commission gave Public Notice of the grant of the Application on November 27, 2013. *See Broadcast Actions*, Public Notice, Report No. 48124 (November 27, 2013).

<sup>2</sup> Objection at 1.

<sup>3</sup> *Id.* at 1-2.

<sup>4</sup> *Id.* at 1.

gentleman from MENSA, invited a guest representing the opposing viewpoint that had no scientific knowledge, and treated callers supportive of the gentleman from MENSA with “derision.”<sup>5</sup>

**Discussion.** Pursuant to Section 73.3587 of the Commission’s Rules (“Rules”), informal objections must be filed before the Commission takes action on an application.<sup>6</sup> Irion filed his Objection one month after staff granted the Application. Therefore, it fails as an informal objection. As it was filed within thirty days of public notice of the grant of the Application, we will treat the Objection as a petition for reconsideration.<sup>7</sup>

Section 1.106(b)(1) of the Rules allows both parties to an original proceeding and non-parties, whose interests were adversely affected, to file a petition for reconsideration of an action taken by the Commission or by the designated authority.<sup>8</sup> Non-parties to the original proceeding must show “with particularity” how their interests were affected and must show good reason why they were unable to participate in the earlier proceeding.<sup>9</sup>

Irion has failed to meet this threshold, providing no explanation for why he did not object to the Application prior to its grant. While the Commission has accorded standing to petitioners for reconsideration who failed to file pre-grant objections when prompt staff action “effectively precludes participation during the initial consideration of an application,”<sup>10</sup> we will not award Irion such standing here. Irion had more than 90 days to object to the Application, but failed to do so.<sup>11</sup> The staff may dismiss a petition for reconsideration seeking to overturn the grant of an application where the petitioner did not show good cause for failing to participate earlier in the proceeding.<sup>12</sup> Accordingly, we will dismiss the Objection.

Even if we were to consider Irion’s arguments on the merits, we would deny the Objection. Under Sections 1.106(c) and (d) of the Rules, the Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission’s original order or raises additional facts, not known or existing at the time of the petitioner’s last opportunity to present such matters.<sup>13</sup> Station license renewals are governed by Section 309(k) of the Communications Act of 1934, as amended, (“Act”) which provides that we are to grant a broadcast station’s license renewal application

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<sup>5</sup> *Id.*

<sup>6</sup> 47 C.F.R. § 73.3587.

<sup>7</sup> 47 C.F.R. § 1.106(f).

<sup>8</sup> 47 C.F.R. § 1.106(b)(1).

<sup>9</sup> *Id.*

<sup>10</sup> *See, e.g., Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854 (1997) (standing awarded to file petition for reconsideration without pre-grant objection when application granted five days after Public Notice of its acceptance); *Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816 (1989) (standing to file petition for reconsideration awarded without pre-grant objection when application granted four days after Public Notice of its acceptance).

<sup>11</sup> *See Broadcast Applications*, Public Notice, Report No. 28052 (August 14, 2013).

<sup>12</sup> *See, e.g., Florida Public Radio*, Letter Decision, 22 FCC Rcd 2305 (MB 2007) (dismissing a petition for reconsideration when a party lacked standing, having not been involved in the case prior to the original disposition of the application, having not shown that its interests were adversely affected by the grant of the application, and having not shown why it was not possible for it to participate in the original proceeding).

<sup>13</sup> *See* 47 C.F.R. § 1.106(c)-(d). *See also WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

if, upon consideration of the application and pleadings, we find with respect to that station that: (1) the station served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no violations which, taken together, constitute a pattern of abuse.<sup>14</sup> Irion has failed to show under the Section 309(k) standard that the staff erred in granting the Application.

With respect to Irion's claim that the Station advocates drug use, Irion has not alleged any violations of any provisions of the Act or the Rules that would have made grant of the Application inconsistent with Section 309(k).<sup>15</sup> Irion has thus failed to show that the Commission erred in granting the Application. Additionally, Irion has provided a mere bare allegation that the Station has promoted unlawful drug use on the air, providing, for example, no support in the form of transcripts of any programming mentioning such drug use or any identification of a specific date and time any such programming aired.<sup>16</sup>

Regarding Irion's claim that Licensee "engages in anti-social behavior on the air," the First Amendment to the United States Constitution<sup>17</sup> and Section 326 of the Act<sup>18</sup> do not give the Commission the "power of censorship" over the content broadcast on radio stations,<sup>19</sup> and the Commission may not "interfere with the right of free speech" of radio broadcasters.<sup>20</sup> Furthermore, the Commission will not take adverse action on a license renewal application based upon the subjective determination of a listener or group of listeners as to what constitutes appropriate programming.<sup>21</sup> A licensee has broad discretion – based on its right to free speech – to choose, in good faith, the programming that it believes serves the needs and interests of its audience.<sup>22</sup> The Commission will intervene in programming matters only if a licensee abuses that discretion.<sup>23</sup> Irion's bare allegations provide insufficient information to indicate that

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<sup>14</sup> 47 U.S.C. § 309(k)(1).

<sup>15</sup> See 47 C.F.R. § 73.4095. Even when the Commission did address on air mentions of drugs in its drug lyrics policy, the Commission only required that broadcasters exercise responsibility when determining the manner in which songs depicted drugs and whether to broadcast said songs. *Licensee Responsibility to Review Records Before Their Broadcast*, Memorandum Opinion and Order, 31 FCC 2d 377, 377 (1971). Furthermore, the Commission believed that "the public interest [was] best served by permitting the expression of any views that [did] not involve 'a clear and present danger of serious substantive evil that rises far above public convenience, annoyance or unrest.'" *Id.* at 378 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). Irion's allegation, unsupported by evidence, that the Station has promoted unlawful drug use on the air fails to indicate that the information broadcast on the Station presented such a danger.

<sup>16</sup> See, e.g., *Mercer County Community College*, Letter, 23 FCC Rcd 851, 851-52 (MB 2008) (conclusory allegations of allegedly racist programming consisting only of a description of the program considered insufficient to make a *prima facie* case that the station abused its programming discretion);

<sup>17</sup> U.S. CONST. amend. I.

<sup>18</sup> 47 U.S.C. § 326.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See *WGBH Educational Foundation*, Memorandum Opinion and Order, 69 FCC 2d 1250, 1251 (1978).

<sup>22</sup> See, e.g., *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993) ("*Philadelphia Station License Renewals*"), citing *Time-Life Broadcast, Inc.*, Memorandum Opinion and Order, 33 FCC 2d 1081, 1082 (1972), and *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (subsequent history omitted).

<sup>23</sup> *Philadelphia Station License Renewals*, 8 FCC Rcd at 6401.

Licensee has abused this discretion in choosing both the content and the manner in which it is presented. Irion has thus failed to show that the Commission erred in granting the Application as consistent with the public interest, convenience, and necessity under Section 309(k) of the Act.

**Conclusion/Actions.** Accordingly, IT IS ORDERED, that the Informal Objection filed by Thomas Irion, treated as a Petition for Reconsideration, is DISMISSED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau