

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

In the Matter of)	MB Docket No. 16-357
)	
ENTERCOM LICENSE, LLC)	Facility ID No. 65483
)	
For Renewal of License for Station KDND(FM), Sacramento, California)	File Nos. BRH-20050728AUU and BRH-20130730ANM

MEMORANDUM OPINION AND ORDER

Adopted: September 7, 2017

Released: September 8, 2017

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order, we dismiss and, on an alternative and independent basis, deny a Petition for Reconsideration (PFR) filed November 28, 2016, by Edward R. Stolz II (Stolz), of the Hearing Designation Order (HDO) in this proceeding, which declined to permit him to intervene as a party.¹ We also dismiss an Application for Review, filed April 17, 2017, by Stolz,² seeking review of an order by Chief Administrative Law Judge Richard L. Sippel (ALJ) terminating this proceeding.³

II. BACKGROUND

2. Proceedings below. The Commission designated this proceeding for hearing in response to allegations that Station KDND(FM) held an on-air water drinking contest called “Hold Your Wee for a Wii” on January 12, 2007, which resulted in the death of contestant Jennifer Lea Strange from water intoxication (hyponatremia).⁴ The designated issues inquired into whether Entercom was aware of the inherent dangers of such a contest and whether Entercom increased those dangers by changing the contest rules; whether Entercom failed to warn contestants of and protect contestants from these dangers; whether Entercom prioritized entertainment over the welfare of the contestants; and whether Entercom failed to train staff and exercise appropriate supervision to ensure safety. The Commission further inquired whether, in light of the evidence adduced under the foregoing issues, Entercom operated KDND(FM) in the public interest during the most recent license term and whether Entercom’s 2005 and 2013 license renewal applications for KDND(FM) should be granted.⁵

¹ Hearing Designation Order and Notice of Opportunity for Hearing, *Entercom License, LLC*, 31 FCC Rcd 12196 (2016). See also Opposition of Entercom License, LLC to Petition for Reconsideration, filed December 8, 2016 (Opposition); Reply to “Opposition of Entercom License, LLC to Petition for Reconsideration,” filed December 20, 2016, by Stolz (Reply).

² See also Opposition of Entercom License, LLC to Application for Review, filed May 2, 2017; Enforcement Bureau’s Opposition to Stolz Application for Review, filed May 2, 2017; Consolidated Reply to Oppositions to Application for Review, filed May 12, 2017, by Stolz.

³ Order, FCC 17M-09 (Mar. 16, 2017) (Termination Order).

⁴ HDO, 31 FCC Rcd at 12197-99, paras. 3-6. A California state court found Entercom negligent based on these same facts and awarded the Strange family \$16.5 million. *Id.* at 12200, para. 10.

⁵ *Id.* at 12229-30, para. 83.

3. The designated issues were based on allegations raised in a petition to deny filed by Edward Stolz, a separate petition to deny filed by his now deceased mother Irene, a petition to deny filed jointly by the Media Action Center (MAC) and Sue Wilson, and an informal objection filed by Roger D. Smith.⁶ The Commission treated Edward Stolz's petition as an informal objection and denied him party status, finding that he was not a local resident or regular listener of the station and thus lacked standing to participate formally.⁷ Stolz seeks reconsideration of this ruling in the PFR now before us.

4. The hearing in this proceeding did not take place. Instead, on February 3, 2017, Entercom notified the ALJ that it was discontinuing the operation of KDND(FM), no longer prosecuting its renewal applications for the station, and tendering the station's license for cancellation. On February 22, 2017, Entercom and MAC submitted a settlement agreement calling for Entercom to reimburse MAC for its hearing expenses.⁸

5. The ALJ approved the proposed settlement and terminated the proceeding.⁹ The ALJ found that the surrender of Entercom's license for KDND(FM) made a hearing on Entercom's 2005 and 2013 renewal applications for KDND(FM) unnecessary and held that "Entercom has willingly accepted the severest penalty of a renewal case by surrendering forever its license to operate KDND(FM), Sacramento, California."¹⁰ The ALJ approved Entercom's reimbursement of MAC's reasonable expenses. Stolz appeals the ALJ's Termination Order in the Application for Review now before us.

6. Stolz's Petition for Reconsideration. In his PFR, Stolz challenges the ruling in the HDO denying his request to intervene as a party in this proceeding. Stolz does not renew his argument that he qualifies for standing as the owner of a residence within the listening area of the station. Instead, he argues that the HDO "overlooked" alternative bases for finding that he has standing.¹¹ Stolz observes that, as a principal of Royce International Broadcasting Company (Royce), he was formerly the licensee of KUDL(FM), another station in the Sacramento market.¹² The Commission affirmed the Media Bureau's grant of the assignment of KUDL(FM) (then KOWD(FM)) from Royce to Entercom, a transaction consummated in 2003.¹³ Stolz has appealed the Commission's grant to the United States Court of Appeals for the District of Columbia Circuit.¹⁴

7. Stolz contends that if he were to prevail in court, he would reacquire the station license and be a competitor of KDND(FM) with a cognizable interest to intervene as a party.¹⁵ Alternatively, Stolz argues that he has a cognizable stake in the KDND(FM) proceeding because it might, pursuant to

⁶ *Id.* at 12196, para. 1.

⁷ *Id.* at 12206, para. 23. Although Irene Stolz had died, her petition was treated as a formal petition that survived her death. *Id.*

⁸ Termination Order at 1-2.

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 2.

¹¹ PFR at 2.

¹² *Id.* at 3.

¹³ See *Royce International Broadcasting Co.*, 20 FCC Rcd 13720 (MB 2005) (denying reconsideration), *rev. dismissed/denied*, 30 FCC Rcd 10556 (2015), *recon. dismissed*, 31 FCC Rcd 214 (2016), *rev. denied*, 31 FCC Rcd 7439 (2016).

¹⁴ *Stolz v. FCC*, No. 16-1248 (D.C. Cir.).

¹⁵ PFR at 4-5, paras. 10-12.

the Commission's *Character Policy Statement*,¹⁶ have resulted in a decision disqualifying Entercom not only as the licensee of KDND(FM) but of all the Entercom stations in the Sacramento market, including KUDL(FM).¹⁷ In that event, Stolz proposes that the KUDL(FM) station license likewise would be restored to Stolz.

8. Entercom responds that the Commission did not "overlook" Stolz's asserted alternative bases for standing. Entercom contends that Stolz, not the Commission, had the burden of identifying any bases for claiming standing and that Stolz should have raised the additional asserted bases for standing in his petition to deny instead of raising them for the first time in his PFR.¹⁸ Further, Entercom asserts that Stolz has failed to demonstrate the kind of current, likely injury necessary to establish standing. Entercom contends that the injury asserted by Stolz is too contingent and speculative to be a basis for standing.¹⁹

9. Stolz's Application for Review. Stolz's Application for Review relies on three principal contentions. First, Stolz complains that, although Entercom tendered the license for KDND(FM) for cancellation, the Commission's database still lists Entercom as the licensee of the station. Second, Stolz asserts that the ALJ erred in not proceeding to hear the issues designated by the HDO and by not ruling on a petition to enlarge issues filed by another party that sought to raise issues as to whether Entercom is qualified to hold its other licenses in the Sacramento area. Third, Stolz argues that the ALJ should have required Entercom to show the actual punitive effect of surrendering the license to KDND(FM).

III. DISCUSSION

10. Petition for Reconsideration. We dismiss and, on an alternative and independent basis, deny the PFR. As a procedural matter, we find that reconsideration is not warranted because Stolz failed to raise the grounds on which he now claims party-in-interest status in a timely manner. Stolz's petition to deny claimed "listener standing" based on his ownership of a home in the station's service area, but the Commission determined that Stolz failed to establish such standing.²⁰ Stolz does not renew his claim of listener standing in his PFR. Instead, Stolz asserts that the Commission "overlooked" facts that would have demonstrated alternative bases for standing (e.g. status as a potential competitor).²¹ Irrespective of what facts the petition to deny may contain, Stolz did not rely on them as a basis for claiming standing prior to seeking reconsideration of the HDO. Specifically, in his petition to deny, Stolz asserted only that he had standing as a listener, and not as a potential competitor. We agree with Entercom that we had no obligation to mine Stolz's petition to deny to search for additional arguments that Stolz might have

¹⁶ *Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon granted in part and denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom, National Ass'n for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. 1987), *modified*, 5 FCC Rcd 3252 (1990), *modified*, 7 FCC Rcd 6564 (1992).

¹⁷ PFR at 3-4, paras. 7-9. Entercom is the licensee of five stations in Sacramento: KUDL(FM), KRXQ(FM), KSEG(FM), KKDO(FM), and KIFM(AM). Applications for renewal of these stations are currently pending.

¹⁸ Opposition at 2-3.

¹⁹ *Id.* at 3-5.

²⁰ HDO, 31 FCC Rcd at 12206, para. 23. *See* Petition to Deny, filed November 1, 2013, by Stolz at 2, para. 2, and Exhibit A, paras. 2-3 (Declaration of Edward R. Stolz II); Reply to Opposition to Petition to Deny, filed December 23, 2013, by Stolz, at 3, para. 3.

²¹ He states: "While 'listener standing' . . . is a moving target, granted or denied at the Commission's whim and caprice, the Commission overlooked other facts alleged in Stolz' 2013 Petition to Deny against Entercom which accord Stolz economic standing to be a party in interest [with] respect to the KDND renewal application." PFR at 2, para. 4.

made.²² Having failed to raise these arguments himself in a timely manner in his petition to deny, he may not do so now for the first time in his PFR. A petition for reconsideration may not rely on facts or arguments known to the petitioner but not presented at the last opportunity to address the matter.²³ This fact alone warrants dismissal of the petition for reconsideration.

11. As an alternative and independent basis for our decision, we find that even if Stolz's arguments on reconsideration for standing are considered on their merits, they do not establish that Stolz is entitled to intervene as a party in interest. To have standing to file a petition to deny or to intervene in a renewal proceeding, a person must qualify as a "party in interest."²⁴ That is, the petitioner must demonstrate that a grant of the application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature.²⁵ We discern two distinct arguments in Stolz's PFR attempting to assert such an interest. First, Stolz claims standing based on economic injury from the renewal of KDND(FM) that he would allegedly suffer as the potential future licensee of competing Sacramento station KUDL(FM).²⁶ As set forth above, however, Stolz is not currently the licensee of KUDL(FM), but has merely appealed approval of the assignment of KUDL(FM) from him to Entercom. Stolz's claim of economic injury as a competitor of KDND(FM) thus rests on the speculative assumption that Stolz will succeed in persuading the D.C. Circuit to overturn the assignment, not on any current status as a competitor. We find that Stolz's assertion of competitive injury, depending as it does on his conjectural future acquisition of KUDL(FM) does not qualify Stolz as a competitor of KDND(FM).²⁷ *Interstate Broadcasting Co. v. U.S.*,²⁸ relied on by Stolz, is not to the contrary. The *Interstate* petitioners showed likely injury in the event of a particular outcome in that case, whereas Stolz is trying to show likely injury in the event of a particular outcome in an entirely different case.²⁹

²² See *Tindal v. McHugh*, 945 F. Supp.2d 111, 130 (D.D.C. 2013) (an agency is not required to anticipate and address any possible argument a party might have made); *Tama Radio Licenses of Tampa Florida, Inc.*, 25 FCC Rcd 7588, 7589, para. 2 (2010) ("The Commission is not required to sift through an applicant's prior pleadings to supply the reasoning that our rules require to be provided in the application for review.").

²³ 5 CFR § 1.106(c). See, e.g., *Barbour Co. Bd. of Education Ariton Alabama*, 12 FCC Rcd 11782, 11784, para. 5 (1997) (Commission will not grant a petition for reconsideration based on a showing that could have been made earlier). As the following paragraphs indicate, Stolz has shown no public interest reason to make an exception to this principle under 47 CFR § 1.106(c)(2).

²⁴ See 47 USC § 309(d)(1) (petition to deny); 47 CFR § 1.223(a) (intervention).

²⁵ See *Pinelands, Inc.*, 7 FCC Rcd 6058, 6063, para. 18 & n.20 (1992).

²⁶ PFR at 4-5, paras. 10-11.

²⁷ See *Pinelands, Inc.*, *supra* note 25 n.20 ("Although [petitioner] competed for the Secaucus facility, it is not currently an economic competitor entitled to standing. . . ."); *Irene M. Neely*, 49 FCC 2d 311, 312 (1074) ("A mere applicant does not have standing to protest because there is no certainty that it will ever obtain the permit applied for."); *Kathleen Victory, Esq.*, 23 FCC Rcd 11910, 11911 n. 18 (Aud. Serv. Div. MB 2008) ("Standing to file a petition to deny . . . as an aggrieved competitor, assumes an actual state of competition. . . ."). See also *Verde Systems, LLC.*, 25 FCC Rcd 9166, 9168 n.18 (Mob. Div. WTB 2010) ("We also reject the suggestion that the pendency of pleadings filed by [petitioner] against affiliates of the applicants with respect to Auctions Nos. 57 and 61 [in other markets] confers standing on [petitioner] to challenge the applications here.")

²⁸ 286 F.2d 539 (D.C. Cir. 1960). See Stolz Reply at 4, para.8.

²⁹ In *Interstate*, a petitioner attempted to intervene in a comparative proceeding based on the allegation that a grant of either of two of the eight competing applications would interfere with the petitioner's station. The court rejected the Commission's conclusion that petitioner's injury was speculative because there was no demonstration that the two interfering applicants were likely to win the proceeding. The court found that it was sufficient for the petitioner to show that likely injury would result if one of them won. In other words, the *Interstate* petitioner showed likely injury in the event of a particular outcome of the case in which it sought to intervene, whereas here Stolz is trying to show injury based on the possible outcome of an entirely different case. Absent a favorable outcome in the

(continued....)

12. Second, Stolz argues that resolution of the KDND(FM) proceeding could ultimately result in findings that Entercom is unqualified to hold KUDL(FM).³⁰ In Stolz's view, this would provide a basis to set aside the assignment of KUDL(FM) to Entercom and restore the station license to him.³¹ Stolz argues that under the Commission's *Character Policy Statement*,³² the misconduct that occurred at KDND(FM) was sufficiently egregious to warrant disqualifying Entercom from holding stations in the Sacramento market other than KDND(FM).³³

13. We find no support for Stolz's argument. KDND(FM) is the only station at issue in the designated proceeding. The HDO in this proceeding specifically designates for hearing only the two above-captioned license renewal applications and delineates the issue designated as "whether Entercom's Applications for Renewal of License of KDND(FM) . . . should be granted."³⁴ In this respect, the scope of the designated issue is restricted by the Communications Act. As the Commission stated in designating this case for hearing, the basis for designation is that "we are unable to make the finding required by [47 U.S.C. §] 309(k)(1)(A)."³⁵ That section provides that the Commission "shall grant the [renewal] application if it finds, *with respect to that station*, during the preceding term of its license [that] the station has served the public interest, convenience, and necessity . . ." (emphasis added).³⁶ Accordingly, no action could be taken against other Entercom licenses or applications, regardless of the *Character Policy Statement*, without further action by the Commission initiating additional proceedings.

14. Moreover, even to the extent the *Character Policy Statement* is relevant, it does not support the designation of a character issue against Entercom. Pursuant to the *Character Policy Statement*, if the Commission considers the misconduct alleged at one station to implicate other stations, it designates those other stations for hearing at the same time.³⁷ We did not designate additional stations here, for example, for revocation.³⁸ This is consistent with the policy reflected in the *Character Policy Statement* that deterrence is an important element of the character qualifications process and that the loss of a single station is generally an adequate sanction.³⁹

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KUDL(FM) proceeding, no outcome of the instant, KDND(FM) renewal proceeding could possibly cause him economic injury as a competitor.

³⁰ PFR at 3-4, paras. 7-9; Reply at 2-3 paras. 4-6. Stolz states: "If they [Entercom] are disqualified from being a Commission licensee of KDND, why would they not also be disqualified from being a licensee of KUDL/KWOD?" PFR at 4, para. 9. *See also* Reply at 2, para. 4.

³¹ Stolz states: "If Entercom were disqualified as a Commission licensee in Sacramento, File No. BALH-20021120ACE [the assignment application] would have to be vacated or dismissed, and KUDL/KWOD would have to be returned to Stolz." PFR at 4, para. 9. *See also* Brief of Appellant, *Stolz v. FCC*, No. 16-1248 (Oct. 31, 2016) at 30-31 (asserting that the designation of KDND(FM) should be considered in the assignment case).

³² *Supra* note 16.

³³ Stolz cites the *Character Policy Statement*, 102 FCC 2d at 1205 n.60, for the proposition that egregious nonbroadcast misconduct might disqualify a licensee.

³⁴ HDO, 31 FCC Rcd at 12229-30, para. 83.

³⁵ *Id.* at 12229, para. 82. *See also Id.* at 12199-200, para. 8.

³⁶ 47 U.S.C. § 309(k)(1)(A). In declining to designate a general character issue against Entercom, the Commission noted that section 309(K)(1)(A) limited the scope of issues relevant to a renewal proceeding to those listed. HDO, 31 FCC Rcd at 12209-10, para. 30 & n.122.

³⁷ *See Character Policy Statement*, 102 FCC 2d at 1224, para. 93.

³⁸ *See* HDO, 31 FCC Rcd at 12209-10, para. 30 & n.122 (noting that under the circumstances it was not necessary to initiate a revocation proceeding to examine Entercom's character qualifications).

³⁹ *See Character Policy Statement*, 102 FCC 2d at 1228, para. 103.

15. In view of the foregoing, we find that Stolz has not demonstrated that he is a party in interest in the above-captioned renewal proceeding. *Elm City Broadcasting Corp. v. U.S.*, relied on by Stolz, which holds that the Commission does not have discretion to deny intervention to a party in interest, is therefore inapposite.⁴⁰

16. Application for Review. Given our finding that Stolz has not shown that he is a party in interest, we need not reach the merits of his Application for Review and thus we summarily dismiss it. As a non-party, Stolz has no authority to appeal the ALJ's termination of the hearing proceeding. The pertinent rule, 47 CFR § 1.302, authorizes only parties to a hearing proceeding to appeal an ALJ's order terminating the proceeding. The rule that authorizes an application for review by "any person aggrieved by any action taken under delegated authority" does not apply to ALJ's rulings in hearing proceedings.⁴¹ Actions by an ALJ in a hearing proceeding are not taken pursuant to delegated authority, but instead are taken by virtue of the authority to control the course of a hearing granted to an ALJ by the Administrative Procedure Act.⁴² In any event, even if an application for review were an appropriate vehicle for seeking review, Stolz would not qualify as "aggrieved" by the ALJ's Termination Order for purposes of section 1.115 for essentially the same reasons, discussed above, that he does not qualify as a party in interest for purposes of intervention in the proceeding. That is, the ALJ's termination of the proceeding did not foreclose the consideration of questions relevant to Stolz's stated interest (whether he could reacquire KUDL(FM)), which were not at issue in the proceeding before the ALJ and which the ALJ could not have considered. As discussed above, the Commission only designated issues with respect to KDND(FM), and the ALJ therefore could not have expanded the hearing proceeding to cover other stations.⁴³

IV. ORDERING CLAUSES

17. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration, filed November 28, 2016, by Edward R. Stolz II IS DISMISSED.

18. IT IS FURTHER ORDERED, that the Petition for Reconsideration, filed November 28, 2016, by Edward R. Stolz II IS, on an alternative and independent basis, DENIED.

19. IT IS FURTHER ORDERED, that Application for Review, filed April 17, 2017, by Edward R. Stolz II IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁰ PFR at 5, para. 2; Reply at 4, para. 7, citing *Elm City Broadcasting Corp. v. U.S.*, 235 F.2d 811 (D.C. Cir. 1956).

⁴¹ 47 CFR § 1.115.

⁴² See *Stephen D. Tarkenton*, 7 FCC Rcd 5973 (1992). The Commission's power to delegate authority derives from 47 USC § 155(c). The ALJ's authority derives from a different statutory provision (5 USC § 556(a), (c)).

⁴³ *Supra* paragraphs 11-13.