

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1028

KERM, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON REVIEW FROM AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

| | |
|-------------------------|--------------------------------------|
| Br. | Petitioner's Brief |
| CDDBS | Consolidated Database System |
| Family Vision | Family Vision Ministries, Inc. |
| Fed. R. App. Proc. | Federal Rule of Appellate Procedure |
| J.A. | Joint Appendix |
| KERM | KERM, Inc. |
| Opp. to App. For Review | Opposition To Application For Review |

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

In this case, KERM, Inc. (“KERM”), a licensed operator of three commercial radio broadcast stations in Arkansas, alleges that KAYH(FM), a non-commercial FM radio broadcast station in Arkansas, broadcast eleven advertisements that violated 47 U.S.C. 399b, as well as Federal Communications Commission rules and orders implementing that statute. The Commission held that only one of those underwriting announcements violated its precedent and, after considering the entire record, declined to impose forfeitures against KAYH(FM). KERM does not contend that the challenged announcements injured it in any way. The issues presented in KERM’s petition for review are:

1. Whether KERM has standing to challenge the Commission's decision not to penalize another licensee for an isolated breach of the rules prohibiting non-commercial stations from broadcasting advertisements.

2. Whether the Commission abused its discretion in finding only one of eleven alleged announcements to violate its prohibition against broadcasting advertisements on non-commercial stations and in declining to impose a penalty for that single violation.

STATUTES AND REGULATIONS

Relevant statutes and regulations not included in the Appendix to petitioner's opening brief are set forth in the Appendix to this brief.

JURISDICTIONAL STATEMENT

KERM asserts jurisdiction under 47 U.S.C. 402(a) and 28 U.S.C. 2342(1), which give the Court jurisdiction to review certain orders of the Commission. As we further explain in Argument I (infra, at pp. 11-20), however, this Court should conclude that it lacks jurisdiction because KERM has shown no injury that would make it a "party aggrieved" within the meaning of 28 U.S.C. 2344 or give it standing under Article III of the Constitution to challenge the Commission's order in this matter. KERM failed to follow this Court's June 30, 2003, Order and present any basis upon which this Court may conclude that KERM has standing. Moreover, there is nothing in the record to establish that KERM has suffered a harm that was caused by the Commission's failure to penalize KAYH(FM) and that can be redressed by such a penalty. Under the Supreme Court and this Court's standing jurisprudence, KERM's interest in seeing the laws enforced is insufficient to establish standing. If the Court concludes, however, that KERM has standing, Section 402(a) of the Communications Act (codified at 47 U.S.C. 402(a)) is the source of the Court's jurisdiction.

COUNTERSTATEMENT OF THE CASE

I. Statutory And Regulatory Background.

In regulating the sponsorship of non-commercial programming, Congress and the Commission have sought to strike “a reasonable balance between the financial needs of [public broadcast] stations and their obligation to provide an essentially noncommercial broadcast service,’ and [to] eliminate those proscriptive regulations deemed unnecessary to preserve the media’s noncommercial nature.” Opinion and Order, Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, 90 F.C.C. 2d 895, 51 Rad. Reg. 1567 (1982), ¶3, quoting, Second Report and Order, Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, 86 F.C.C. 2d 141, 49 Rad. Reg. 889 (1981), ¶1.

In 1981, Congress amended 47 U.S.C. 399a and 399b “to ensure that the public telecommunications media remains financially viable in view of substantial federal funding restrictions, by encouraging and facilitating the ability of public broadcasters to generate additional private financial support which is necessary for their continued survival.” Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, 90 F.C.C. 2d 895 (1982), ¶3. Subparagraph(b) of 47 U.S.C. 399a authorizes public broadcast stations to “broadcast announcements which include the use of any business or institutional logogram and which include a reference to the location of the corporation, company, or other organization involved, except that such announcements may not interrupt regular programming.” 47 U.S.C. 399a(b). Subparagraph (a) of 47 U.S.C. 399a defines a “logogram” as “any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization and which is not used for the

purpose of promoting the products, services, or facilities of such corporation, company, or other organization.” 47 U.S.C. 399a(a). Subparagraph (b)(1) of 47 U.S.C. 399b authorizes public broadcast stations “to engage in the offering of services, facilities, or products in exchange for remuneration.” 47 U.S.C. 399b(b)(1). Under subparagraph (b)(2), however, a public broadcast station may not “make its facilities available to any person for the broadcasting of any advertisement.” 47 U.S.C. 399b(b)(2). Subparagraph (a) of the statute defines an “advertisement,” in relevant part, as “any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration” and “which is intended to promote any service, facility, or product offered by any person who is engaged in such offering for profit.” 47 U.S.C. 399b(a)(1).

The Commission amended its rules and policies governing noncommercial FM radio broadcast stations and broadcast television stations to conform to these statutory changes. Memorandum Opinion and Order, Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, 90 F.C.C. 2d 895, 51 Rad. Reg. 1567 (1982), ¶10. Consistent with amended Section 399B, Rule 73.503(d), which governs noncommercial FM radio broadcast stations, no longer prohibits promotional announcements on behalf of not-for-profit entities; the rule prohibits only promotional announcements on behalf of for-profit entities for which the licensee receives consideration. Id. at ¶¶ 8, 10. In accord with amended 47 U.S.C. 399a, the Commission also prohibited the broadcast of donor announcements during regular programming. Id. at ¶¶ 11, 12; 49 FR 36171, 36178 (1982). Rule 73.503(d) now reads, in relevant part:

No promotional announcement on behalf of for profit entities shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees. However, acknowledgements of contributions can be made. The scheduling of any announcements and acknowledgements may not interrupt regular programming.

And, in 1984, the Commission relaxed its prohibitions against the use of brand names in donor and underwriter announcements on the basis of a recommendation by the Congressionally established Temporary Commission on Alternative Financing for Public Telecommunications. Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, 90 F.C.C. 2d., at ¶¶10-13 & n.22. The 1984 Order summarized the Commission’s policy, to date, concerning donor acknowledgments, by stating, they may include: “(1) logograms or slogans which identify and do not promote, (2) location, (3) value neutral descriptions of a product line or service, (4) brand and trade names and product or service listings.” *Id.* at ¶13. In a Public Notice, initially released in 1986 and then reprinted in 1992, the Commission reaffirmed its 1984 guidance and added that donor announcements may not contain price information, call consumers to action (e.g., “[s]top by our showroom”), or contain an inducement to buy (e.g., “six months’ free service”). In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations, 7 F.C.C.R. 827 (1992).

The Commission acknowledged that it can be difficult for public broadcasters to determine when an underwriting announcement goes beyond merely identifying a product to promoting the product. Therefore, the Commission explained that it “expect[ed] our public broadcast licensees to exercise their reasonable, good faith judgments in this regard.” *Id.* at ¶26.

II. The Facts Of This Case.

On August 29, 2001, KAYH(FM), which is operated by Family Vision Ministries, Inc. and licensed to Fayetteville, Arkansas, received proposed underwriting announcements from eleven businesses that had agreed to support KAYH(FM)’s inaugural broadcast of Springdale

Junior High School's football game on August 30, 2001.¹ Family Vision Ministries, Inc.'s Opposition to Application for Review, at 1; (JA 26).

On October 9, 2001, KERM filed a formal complaint with the Federal Communications Commission's Enforcement Bureau (JA 1). KERM contended that the eleven announcements, which KERM aired during the broadcast of the football game on August 30 (quoted above at pp. 7-9), violated 47 U.S.C. 399b and 47 C.F.R. 73.503(d), as well as Commission guidance on the content of underwriting and donor announcements (JA 5). KERM did not claim any damages or seek other make whole relief. It requested that the Commission order KAYH(FM) to pay \$2000 of forfeitures per alleged violation (JA 5).

On May 15, 2002, the Enforcement Bureau issued a letter to Family Vision in which it held that the "announcement allegedly made on behalf of Arvest Farmer's and Merchant's Bank * * * characterizes the underwriter's service in comparative and qualitative terms, which is prohibited," under Commission precedent (JA 12). The letter also found that the announcement improperly "referred to the bank's cost free services" (JA 13). The Bureau also explained that it considered the length of that announcement in holding that the announcement was promotional: "While the Commission has not adopted quantitative limitations on underwriting announcements, it has noted that the longer they take to identify their underwriters, the more likely they are to be found promotional" (JA 13).

The Bureau did not, however, hold that the other challenged announcements had violated the Commission's rules or policies prohibiting noncommercial stations from airing promotional

¹ In its Complaint, KERM twice challenged the same announcement from the Armadillo Grill (JA 8-10). Therefore, although the Order under review refers to twelve announcements, KERM actually challenged eleven different announcements, ten of which are at issue in the matter on review.

announcements. Since “it appear[ed] that the airing of the Arvest Farmers’ and Merchant’s Bank message in question was an isolated occurrence,” the Bureau determined that “no enforcement action is warranted” (JA 13). The Bureau concluded its letter by asking KAYH(FM) to review the transcript of the Arvest Bank announcement and, to “tailor [KAYH(FM)’s] underwriting announcements to comply fully with [the Commission’s] underwriting rules” (JA 13).

On June 12, 2002, KERM filed an Application for Review of the Enforcement Bureau’s letter ruling (JA 14). KERM argued that the Bureau’s decision was inconsistent with the Communications Act and Commission precedent (JA 17). KAYH(FM) filed an Opposition to the Application For Review and attached a declaration from its General Manager Robert Johnson (JA 32). Mr. Johnson said that when the football game aired on August 30 with the announcements, he realized that “that some of the announcements did not comply with current station policy and needed to be changed.” Opp. to App. For Review, Appendix A (JA 32). Under Johnson’s direction, “[a]ll of the announcements in question were replaced by the next Thursday’s game.” *Ibid.* (JA 32). According to Johnson, KAYH(FM) also “implemented policy and procedure changes to better avoid airing potentially commercial material in the future.” Among the corrective measures KAYH(FM) adopted, were: an underwriting and donor announcement policy; a master script file; “requiring that each approved script is initialed and dated by the approving party prior to production”; “hiring additional office personnel to free [Johnson] to spend more time overseeing approval and production of underwriting announcements”; and “revising the supporter agreement to make it compatible with the non-commercial nature of the station.” *Ibid.* (JA 32).

On January 31, 2003, the Commission denied KERM’s Application For Review (JA 46). The Commission explained that the “staff’s May 15, 2002, letter ruling properly concluded that

station KAYH(FM)'s broadcast of the Arvest Farmer's and Merchants' Bank underwriting announcement represented an 'isolated occurrence' of licensee noncompliance with the pertinent statute and Commission rules" (JA 46). The Commission determined that the "station's broadcast of this announcement did not warrant any sanction" because "the [10] additional announcements complained about by KERM are permissible" under Commission precedent (JA 46). The Commission explained that those additional announcements "briefly describe their underwriter's products or services, in value-neutral terms, and list business addresses and telephone numbers, consistent with the identification-only purpose of underwriting announcements" (JA 47). The Commission also reasoned that the "announcements do not provide prohibited price information, attempt to induce business patronage, call listeners to action, or seek to distinguish or compare their products or services in a favorable manner to those of their competitors" (JA 47).

With regard to KERM's claim that the Commission should have sanctioned KAYH(FM), the Commission found that "KERM does not adequately explain why the imposition of a formal sanction would be required to ensure KAYH(FM)'s prospective rule compliance" (JA 47). After noting that it has broad discretion whether to impose sanctions, the Commission stated that "after reviewing KERM's application for review, the responsive pleadings, and the underlying record, we * * * conclude that the decision not to impose a sanction was correct" (JA 47).

SUMMARY OF THE ARGUMENT

1. This Court should dismiss the petition for review because KERM lacks standing to challenge the Commission's decision that ten of eleven underwriting announcements, aired by KAYH(FM) on one occasion, did not violate the prohibition against noncommercial stations broadcasting promotional announcements by for-profit entities. KERM failed to follow the

Court's directive, in the briefing order, and did not provide, in its opening brief, any basis from which this Court may conclude that KERM meets the three-part standing test. KERM has not alleged any injury, let alone a present or continuing injury – the only types of injuries that are justiciable. KERM seeks this Court's review to ensure the Commission enforces the laws prohibiting advertisements on noncommercial broadcast stations. Under the precedent of the Supreme Court and this Court, that interest fails to satisfy the causation and redressability prongs of the Article III standing test.

2. Contrary to KERM's contentions, the Commission's decision is fully consistent with Sections 399A and 399B of the Communications Act of 1934, as amended. Those statutes provide that: underwriter announcements may contain information to identify underwriters; but announcements that are intended to promote the underwriters' products or services are prohibited. The Commission followed its prior precedent in this area and properly determined that the ten announcements at issue are permissible because they "briefly describe their underwriter's products or services, in value-neutral terms, and list business addresses and telephone numbers, consistent with the identification-only purpose of underwriting announcements" (JA 47). The Commission further explained that the announcements do not violate Section 399B's prohibition against announcements that are intended to promote products or services because the announcements do "not provide prohibited price information, attempt to induce business patronage, call listeners to action, or seek to distinguish or compare their products or services in a favorable manner to those of their competitors" (JA 47). KERM misreads the legislative history of Section 399A when it contends that Congress did not want brand names of products in donor announcements. KERM's precise dispute with the announcements, here, is that they include more information identifying an underwriter and more

value-neutral descriptions of an underwriter's products and services than KERM believes is appropriate. The Commission's decision about whether an announcement includes a permissible amount of identifying information and value-neutral descriptions of products is the type of "line drawing" exercise to which this Court accords federal agencies considerable deference.

STANDARD OF REVIEW

When reviewing orders of an agency, the Court asks whether they are arbitrary or capricious. United Church of Christ v. FCC, 327 F.3d 1222, 1224 (D.C. Cir. 2003). "For challenges to the Commission's construction of the statute it administers, the court's review is governed by the familiar framework in Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)." UCC, 327 F.3d at 1224. Under the first step of the Chevron test, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Ibid., quoting Chevron, 467 U.S. at 842. Under the second step of the analysis, if "Congress has not directly addressed the precise question at issue,' the court must decide whether the agency's action is a 'permissible construction of the statute,' to which the court must defer." UCC, 327 F.3d at 1224, quoting Chevron, 467 U.S. at 843.

This Court is "considerably more deferential" to the Commission when issues are "elusive" or "not easily defined," and when the Commission must engage in "line drawing." Sinclair Broadcast Group v. FCC, 284 F.3d 148 (D.C. Cir. 2002); AT&T Corp. v. FCC, 220 F.3d 607, 626-27 (D.C. Cir. 2000). This Court also "giv[es] controlling weight to the Commission's interpretation, unless it is plainly erroneous or inconsistent with the regulation." UCC, 327 F.3d at 1224.

ARGUMENT

I. KERM LACKS STANDING TO CHALLENGE THE COMMISSION'S DECISION

A petitioner bears the burden of establishing that it has standing under Article III of the Constitution. Jaramillo v. FCC, 162 F.3d 675, 676 (D.C. Cir. 1998). The fact that the Commission addressed a party's complaint is insufficient to establish that the party also has standing before an Article III court. Fund Democracy v. SEC, 278 F.3d 21, 27 (D.C. Cir. 2002). In its order, dated June 30, 2003, this Court instructed the petitioner that it should seek to establish standing either through arguments, affidavits, or any other evidence, "at the first appropriate point in the review proceeding." See June 30, 2003, Order, quoting Sierra Club v. EPA, 292 F.3d 895, 900-01 (D.C. Cir. 2002) (JA 49); see also Fed R. App. Proc. 28(a)(4)(A). KERM failed to follow this directive; its opening brief does not address standing. Moreover, under the precedents of the Supreme Court and this Court, KERM cannot show that it has Article III standing.

In order to establish a "case or controversy," and thereby satisfy Article III's standing requirement, a complainant must meet each part of a three-part test. The party must: (1) allege an injury in fact, that is (2) caused by the defendant, and that (3) can be redressed by the requested relief. Huddy v. FCC, 236 F.3d 720, 722 (D.C. Cir. 2001); Branton v. FCC, 993 F.2d 906, 908 (D.C. Cir. 1993), cert. denied, 511 U.S. 1052 (1994). The alleged injury must be "distinct and palpable" (*id.* at 908, quoting, Warth v. Seldin, 422 U.S. 490, 501 (1975)), not "conjectural or hypothetical." Branton, 993 F.2d at 908, quoting Los Angeles v. Lyon, 461 U.S. 95, 101-02 (1983). To establish causation, the injury must be fairly traceable to the challenged action. Branton, 993 F.2d at 910.

In cases in which a party has sued a government actor to enforce a particular law, the Supreme Court has “consistently [held] that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.” Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973); see also, Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 106-07 (1998). The Court’s holding in those cases is based upon the principle that “[o]ne who has no interest of its own at stake always lacks standing.” Linda R.S., 410 U.S. at 617 n.4, quoting, K. Davis, Administrative Law Text 428 - 429 (3d ed. 1972). In Linda R.S., for instance, the Supreme Court held that a mother lacked standing to challenge a state’s decision not to enforce a child support statute against the father of their child because it was only speculative that the requested relief (prosecuting the father) would result in payment of support to the mother. Id. at 618. In its more recent decision in Steel Company, the Supreme Court relied upon Linda R.S. to hold that an environmental group did not establish the redressability prong of the constitutional standing test in part because the group brought suit, not to remedy its own injury, but only to require a Chicago steel company to pay penalties allowed under a federal statute. Steel Company, 523 U.S. at 106-07.

This Court has relied upon the Supreme Court’s rationale, in cases such as Linda S. and Steel Company, to dismiss petitions by listeners and competitors who sought review of a Commission decision not to penalize a broadcast licensee for failing to follow the agency’s rules. Jaramillo, 162 F.3d at 676 (no standing as listener or competitor); Branton v. FCC, 993 F.2d 906 (no standing as listener). In Branton, for example, National Public Radio aired a taped conversation between John Gotti, an alleged leader of a crime syndicate, and an associate in which Gotti used the “f-word” ten times in a 110-word passage. Branton, 993 F.2d at 908. Branton was offended by the broadcast and filed a complaint with the Commission. Ibid. The

agency rejected Branton's complaint because the broadcast material "did not provide the necessary legal basis for further Commission action." Id. at 908.

On review, this Court held that Branton failed to allege a justiciable injury because "a discrete, past injury cannot establish the standing of a complainant, such as Branton, who seeks neither damages nor other relief for that harm, but instead requests the imposition of a sanction in the hope of influencing another's future behavior." Ibid. The Branton Court stated that a person who alleges a recurring practice of misconduct "might be in a better position to argue that he is subject to a continuing harm." Id. at 910. The Court acknowledged, however, that the Supreme Court has held that the allegation of a routine practice of misconduct is not enough to establish standing. Ibid., citing Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

With regard to the causation and redressability prongs of the test, the Branton Court explained that, in Linda R.S., the Supreme Court held it is "particularly disinclined to find that causation and redressability are satisfied where a complainant challenges only an Executive Branch decision not to impose costs or penalties upon some third party." Id. at 910-11. As the Branton Court further explained, "any favorable impact of the official action that the complainant seeks to compel depends utterly upon the actions of 'third parties not before the Court,' whose behavior is difficult to predict." Id. at 911. The Court reasoned that "radio stations might well decide that the benefits of broadcasting indecent language * * * outweigh the costs of making certain payments to the Government." Ibid. This Court therefore held that Branton had failed to satisfy causation and redressability because "it is speculative whether our reversal of the agency's decision would serve at all to protect the petitioner from future exposure to broadcast indecency." Ibid.

Under the principles established in Linda R.S., Steel Company, and Branton, KERM lacks standing. Indeed, KERM presents a weaker case than the complainants involved in those decisions because KERM has not even alleged that KAYH(FM)'s airing of the announcements, on August 30, 2001, caused it any injury. Additionally, KERM challenges only the past conduct of KAYH(FM), which does not "amount to that real and immediate threat of injury to make a case or controversy." Branton, 993 F.2d at 908, quoting Los Angeles v. Lyons, 461 U.S. 95, 103 (1983); compare, Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167 (2000) (environmental groups had standing to seek penalties for ongoing violations). KERM seeks only that the Commission penalize KAYH(FM) in order to influence the behavior of that station. For the same reasons this Court explained in Branton, *id.* at 910-911, that is insufficient to satisfy the causation and redressability parts of the standing test.

In its opening brief, KERM claims that it has three "nearby commercial radio broadcast stations KURM(AM), Rogers, Arkansas, KARV(AM), Russellville, Arkansas, and KARV-FM, Ola, Arkansas." Br. 2. KERM does not explain the significance of the fact that it owns these stations. Perhaps it intended to suggest that one or more of its stations has a service area which overlaps the service area of KAYH(FM) and to claim that it was injured competitively by KAYH(FM)'s violation of FCC rules. Specifically, KERM may be suggesting that if KAYH(FM) could not lawfully air the challenged announcements, the local businesses would turn to KERM's station as an outlet for having these announcements broadcast.

There are at least two problems with an attempt to establish standing on this basis. First, it is not clear that these announcements are being diverted after August 30, 2001, away from KERM and other commercial stations to KAYH(FM). The General Manager of KAYH(FM) has stated that he realized that some of the August 30 announcements did not comply with his

station's then current policy and he replaced those announcements and instituted policy changes to ensure against a return of these and other questionable announcements. He says that the announcements were replaced with different announcements by a date which was approximately one month before KERM filed its complaint. Neither in that complaint nor elsewhere has KERM complained about any announcements being broadcast on KAYH(FM) after August 30. In sum, assuming KERM is correct in contending that the FCC's decision afforded KAYH(FM) an opportunity to divert the announcements at issue in KERM's complaint away from KERM and other commercial stations in the service area, the record does not show that KAYH(FM) is presently availing itself of this opportunity or has any intent to do so.

Second, even if the businesses whose announcements were the subject of the August 30 broadcast continue to have KAYH(FM) as an available outlet for airing these announcements, it is highly speculative that KERM would be a beneficiary if these businesses could no longer get these announcements aired over KAYH(FM). The eleven Springdale businesses that chose to have KAYH(FM) broadcast their announcements likely did so because KAYH(FM) was broadcasting the Springdale Junior High School football game and that broadcast would attract Springdale listeners. KERM has not shown that it attempted to broadcast Springdale Junior High School football games. Even if the businesses would be satisfied to have these announcements broadcast in connection with programming other than football, it is speculative that they would turn to KERM's station. A search through the pertinent on-line FCC database suggests that there are eight other licensed commercial broadcast stations in the vicinity of KAYH(FM).² KERM

² The stations can be obtained from the CDBS public database located in the Media Bureau Section of the FCC's internet website (www.fcc.gov). The specific web address for the CDBS database is http://svartifoss2.fcc.gov/prod/cdbs/pubacc/prod/sta_sear.html.

has made no showing that Springdale businesses would have been more likely to choose a KERM station over the other commercial broadcast radio stations available to those businesses. Therefore, any claim that the FCC's decision upholding the right of a noncommercial station to broadcast these announcements caused KERM economic injury as a competitor would be too conjectural to present an actual case or controversy.

II. THE COMMISSION DID NOT ABUSE ITS DISCRETION IN HOLDING THAT THE TEN UNDERWRITING ANNOUNCEMENTS, AT ISSUE HERE, ARE PERMISSIBLE

KERM claims that the Commission erred when it concluded that only one of the eleven announcements KAYH(FM) aired on August 30, 2001, was inconsistent with: 47 U.S.C. 399a and 47 U.S.C. 399b; Commission precedent; and Congressional intent as evidenced by the legislative history of the statutes. KERM contends that all of these announcements should have been found unlawful. For the reasons explained below, those arguments are meritless.

A. The Communications Act Permits Noncommercial Stations To Broadcast Announcements That Identify Underwriters and Provide Value-Neutral Description of Products.

When a statute does not clearly address a specific question, this Court defers to the Commission's interpretation of the statute if it is permissible. United Church of Christ v. FCC, 327 F.3d 1222, 1224 (D.C. Cir. 2003), citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

The statutes at issue here, 47 U.S.C. 399a and 47 U.S.C. 399b, do not specify what content may not be contained within an underwriter announcement. Subparagraph (b) of 47 U.S.C. 399a, in pertinent part, authorizes public broadcast stations "to broadcast announcements which include the use of any business or institutional logogram and which include the reference

to the location of the corporation, company or other institution involved.” 47 U.S.C. 399a(b).

Subparagraph (a) defines a logogram as “any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization and which is not used for the purpose of promoting the products, services, or facilities of such corporation, company, or other organization.” 47 U.S.C. 399a(b).

Subparagraph (c) further provides that the statute “shall not be construed to limit the authority of the [Federal Communications] Commission to prescribe regulations relating to the manner in which logograms may be used to identify corporations, companies, or other organizations.” 47 U.S.C. 399a(c).

The statute which prohibits advertisements on behalf of for-profit entities is codified at 47 U.S.C. 399b and it provides, in relevant part, that “each public broadcast station shall be authorized to engage in the offering of services, facilities, or products in exchange for remuneration.” 47 U.S.C. 399b(b)(1). Subparagraph (b) of 47 U.S.C. 399b, however, provides that “[n]o public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.” 47 U.S.C. 399b(b)(2). Subparagraph (a) of the statute defines an “advertisement,” in relevant part, as “any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended to promote any service, facility, or product offered by any person who is engaged in such offering for a profit.” 47 U.S.C. 399b(a)(1).

In sum, when read together, 47 U.S.C. 399a and 47 U.S.C. 399b generally prohibit noncommercial broadcast stations from broadcasting announcements from for-profit entities that are “intended to promote” products or services. Under subparagraphs (a) and (b) of 47 U.S.C. 399a, it is apparent that Congress did not consider announcements that are used “for the purpose

of identifying a company” and that include “a reference to the location” of the company to be an unlawful promotion of products or services. 47 U.S.C. 399a(a) & (b). Other than that guidance, however, the plain language of the statutes does not provide what specific information in an announcement would constitute unlawful promotion.

The Commission has, however, issued interpretive guidance on this issue. KERM presumably concedes the existence of our guidance, but still disagrees with us on its significance. In Public Notice, In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations, 7 F.C.C.R. 827 (1992), the Commission stated that underwriter announcements may contain: (1) logograms which identify and do not promote, (2) location, (3) value neutral descriptions of a product line or service, and (4) brand and trade names and product or service listings. 7 F.C.C.R. 827. The Commission also stated, in the Public Notice, that announcements may not provide price information, attempt to induce business patronage, or call listeners to action. Ibid.

In addition, in Xavier University, 5 F.C.C.R. 4920 (1990), the Commission determined that the following announcements are permissible under the Act:

Morning Edition is brought to you in part by Ametury (sic) and Associates offering creative services for advertising, marketing and training.

The Choice is Yours is pleased to sponsor programming on WVXU. Health food store and restaurant, The Choice is Yours is located at 821 Delta, on Mount Lookout Square.... Fresh and original foods are the specialty.

Morning Edition is made possible in part by a grant from Arthur Anderson and Company and Anderson Consulting, serving accounting and audit, tax and management information consulting needs for over 75 years.

Morning Edition is made possible in part by Strauss and Troy, a Cincinnati based law firm in its 36th year.

B. The Commission Properly Found That All But One Of The Announcements Here Complied With Applicable Restrictions.

The Commission properly applied the principles it has developed in this area to this case.

According to KERM's complaint, KAYH(FM) aired on August 30, 2001, during its inaugural broadcast of the Springdale Junior High School football game.

Announcement 1

Woman: Excuse me. Can you tell me how to get to Fayetteville?

Man: Sure, it's right there.

Woman: That's a Arvest Farmer's and Merchant's Branch, and we're in Prairie Grove.

Man: Yeah, you can bank there, same as you can bank in Fayetteville.

Woman: Well that's fine, but I didn't need to bank. I was actually going to Fayetteville to visit my daughter.

Man: She in college? She probably just rather have money. You can deposit it here, and she can get it in Arvest Mechanenrow in Fayetteville, and you wouldn't even have to pay a fee.

Woman: Look, I don't have time for this. I've driven all the way here from Fort Smith.

Man: Oh, then you could have made the deposit in Arvest Bank in Fort Smith, saved yourself a trip. While you're here, though, drive on over to Springdale. Arvest has a nice new branch there.

Woman: I don't have time for you to tell me about all of their locations.

Man: You sure don't. They've got over fifty. We'd be here all day. Which is o.k. Some branches are open 'til 7.

Woman: Never mind.

Announcer: Arvest. A family of banks. A world of possibilities.

Woman: Excuse me, can you tell me how to get to Fayetteville?

Second Woman: Sure, see that bank branch right there...

[Woman: Sigh of exasperation].³

Announcer: All Arvest Banks are Member FDIC.

Announcement 2

The Armadillo Grill in Springdale offers steaks, burgers, and barbeque [as well as] catering. They cater tailgate parties, holiday parties, and also company picnics. The Armadillo Grill caters everything from appetizers to sit-down dinners for any size group. They also have daily lunch specials. That's the Armadillo Grill, just off Highway 412 at Interstate 540 in Springdale.

³ Brackets are intended to denote the differences between the Commission and KERM's transcription of the announcements.

Announcement 3

The Color Shop for de-vo paint. For all your paint [and paint] supplies. The Color Shop, 402 West Sunset. Custom color matching, de-vo paint and stains, professional equipment and supplies. The Kissingers have been helping to paint the town for years. De-vo paint and the Color Shop, 756-8760.

Announcement 4

Spring Street Grill and Catering serves home style food, located at 101 North Spring Street in downtown Springdale. Bill Platowski and his staff bake their pies daily. For lunch or dinner, plus Spring Street Grill offers catering services for any size group, large or small. A proud supporter of Springdale High athletics for many years, in the heart of Springdale. Spring Street Grill, 751-0323.

Announcement 5

Changing faces and changing smiles. That's the emphasis at the Maxillo Facial Surgery Center. Dr[s]. Scott Bolding, Steven Stoching, and Frank Grammar, caring for your face and smile. The Maxillo Facial Surgery Center specializes in dental implants, facial reconstruction procedures, and wisdom teeth removal. Surgery is sometimes planned and sometimes expected, but it never has to be unpleasant. The Maxillo Facial Surgery Center, with locations at Fayetteville and Springdale. 582-3000.

Announcement 6

Northwest Tires is proud to support Springdale Bulldog Football. Northwest Tires carries Toyo open country tires, including the Toyo M410 open country light truck radial. The Toyo M410 open country radial is designed for pickups, vans, and sport utility vehicles with a choice of whi[t]e outline or black serrated sidewall lettering. Northwest Tires is located at 1809 South Pleasant Street in Springdale. The phone number for Northwest Tires is 751-2700. Northwest Tires backs the Red Dogs.

Announcement 7

Pizza-In-Springdale is a proud supporter of Bulldog Football on Family FM. They offer Springdale's original lunch buffet 11 a.m. t[il] 2 p.m. daily, plus an evening buffet from 5 p.m. to 8:30 p.m. every night except Thursday. Pizza-In-Springdale serves New York pan pizza, Italian hand tossed pizza, and original thin crust pizza. Pizza-In-Springdale also delivers from 11 a.m. to 10 p.m. Their telephone number is 751-1004. That's 751-1004. Pizza-In-Springdale is located at 1008 West Sunset, one block west of 71B. Pizza-In [] backs the Bulldogs.

Announcement 8

First National Bank of Springdale was with you when you started your business by providing needed capital for start-up and equipment purchases. We're with you today, helping with [] seasonal cash needs, and your inventory demand. And we'll be with you in the future as your business continues to grow and prosper,

furnishing required financial support and employee benefit plans, to help control costs and retention. With you, First National Bank of Springdale, Member FDIC.

Announcement 9

Posa's House of Pasta proudly continues its long standing tradition of the Springdale Bulldogs' pre-game feast. Now located at the Ozarks Center, Point Place Outlet Mall. Posa's House of Pasta is open from 9 a.m. to 8:30 p.m. Monday through Saturday. Posa's House of Pasta offers dining-in or carry-out dinners with catering and gift baskets available too. Posa's serves a selection of pasta dishes including chicken fettuccini, lasagna, spaghetti, ravioli, chicken parmesan, as well as burgers and sandwiches. Posa's House of Pasta, 751-3301.

Announcement 10

Williams Tractor in Fayetteville and Maryville support the Springdale Bulldogs, and offer the Polaris Magnum 325 4X4 Shaft Drive ATV with an intelligent four-wheel drive system, that engages both front wheels at full torque, so all four wheels can drive. That's Williams Tractor in Fayetteville and Maryville, with a Magnum 324 4X4. ATVs can be hazardous to operate. Adult machines only, 16 years or older. Training is required. The phone number is 800-342-3764.

Announcement 11

Signature Cleaners in Springdale. Dry cleaning and laundry service. One day dry cleaning and complete laundry services, including alterations, pillow cleaning, wedding gown preservation, and leather and suede cleaning. Signature Cleaners, located at Signature Square, 1301 E. Robinson, in Springdale. 872-7500.

The Commission correctly held that the first announcement, concerning Arvest Bank, was inconsistent with its precedent because it “characterizes the underwriter’s service in comparative and qualitative terms” (JA 12). The Bureau also found that the announcement improperly “referred to the bank’s cost free services” (JA 13). The Commission also explained that it considered the length of that announcement in holding that the announcement was promotional: “While the Commission has not adopted quantitative limitations on underwriting announcements, it has noted that the longer they take to identify their underwriters, the more likely they are to be found promotional” (JA 13).

The Commission appropriately decided, however, that the other ten announcements were permissible. As the Commission explained, the announcements: “briefly describe their

underwriter's products or services, in value-neutral terms, and list business addresses and telephone numbers, consistent with the identification-only purpose of underwriting announcements" (JA 47). The Commission also determined that the announcements "do not provide prohibited price information, attempt to induce business patronage, call listeners to action, or seek to distinguish or compare their products or services in a favorable manner to those of their competitors" (JA 47).

The Commission also explained why the specific language in several of the challenged announcements were permissible. For example, the Commission found that the "Armadillo Grill announcement's mention of 'daily lunch specials' is acceptable because it appears to refer to the variety of the restaurant's luncheon offerings and, thus, does not convey prohibited price information." The Commission deemed the Color Shop's "offering of 'professional equipment and supplies'" permissible because "it refers to the general type of merchandise offered and is not specifically promotional of the underwriter." The Commission properly approved the Spring Street Grill and Catering announcement's mention that it offers "home style food" and "bakes [its] pies daily" because it "appears to identify its products in a general, categorical manner" (JA 47).

C. KERM's Challenges To The Commission's Decision Are Unavailing.

1. KERM challenges the ten announcements because they contain street addresses, brand names, or state the number of years of service an underwriter has provided to the community, or use adjectives to describe the products and services an underwriter offers. Br. 18-21. It is apparent, however, from the announcements the Commission approved in Xavier, and its guidance in the 1986 Public Notice (supra, at pp. 18-19) that such statements are permissible

under Commission precedent. Because that precedent embodies a reasonable interpretation of the statute, it should be upheld.

2. KERM also argues (Br. 14-15), that the ten announcements are impermissible because they are inconsistent with Congressional intent as evidenced by the House Report that accompanied the House bill which was enacted as 47 U.S.C. 399a. See H.R. Rep. No. 97-82, pp. 23-24 (1981). KERM quotes a provision of that House Report which, according to KERM, provides what Congress did not want included in announcements. Br. 14-15. The only specific limits that quote appears to list, however, pertain to logograms. Logograms are, by their nature, much shorter than underwriter announcements, which are at issue in this case. 47 U.S.C. 399a(a) (defining logograms). Accordingly, one would expect Congress to be much more restrictive with regard to what a logogram may contain.

The portion of the quote, from House Report No. 97-82, that the Commission considered relevant to underwriter announcements was the language concerning brand names of products. Memorandum Opinion and Order, Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, 97 F.C.C. 2d 255 (1984), ¶10. What KERM fails to mention is that when the Commission in 1984 relaxed its limits and thereby permitted enhanced underwriting announcements to include brand and trade names, it carefully considered the statements in House Report No. 97-82 and provided a sound rationale why enhanced announcements would be consistent with Congress's intent. As the Commission explained, the House Report also stated that “[the House] Committee intends to review this area more fully as part of its consideration of the [Temporary Commission on Alternative Financing for Public Telecommunications] (TCAF) study required by the bill on allowing corporations to name specific products.” Id. at ¶10, quoting, H.R. Rep. No. 97-82, p. 25 (1981). In October 1983,

TCAF concluded its study and, in its final report to Congress, “recommended that Congress: Direct the Federal Communications Commission to modify its policies concerning underwriting acknowledgements to permit public broadcasters to identify supporters by using brand names, trade names, slogans, brief institutional type messages and public service announcements.” *Id.* at ¶11 & n.22. In light of that TCAF recommendation, the Commission properly determined in 1984 that relaxing its restrictions on product descriptions, such as permitting the use of brand names in donor and underwriter announcements would be consistent with Congress’s purpose for enacting 47 U.S.C. 399b.

3. On pages 18-21 of its opening brief, KERM presents a side-by-side comparison of the announcements, as they were broadcast on August 30, 2001, and as modified by KERM to conform with, in KERM’s words, “legally permissible broadcasts based on Commission and Congressional restrictions.” Br. 17. A few examples of those comparisons are presented below.

For example, Announcement 2 as originally broadcast stated:

The Armadillo Grill in Springdale offers steaks, burgers, and barbeque [as well as] catering. They cater tailgate parties, holiday parties, and also company picnics. The Armadillo Grill caters everything from appetizers to sit-down dinners for any size group. They also have daily lunch specials. That's the Armadillo Grill, just off Highway 412 at Interstate 540 in Springdale.

KERM argues that Announcement 2 would be legal only if modified to state:

This Broadcast is underwritten in part by the Armadillo Grill. The Armadillo Grill in Springdale offers steaks, burgers, and barbeque [as well as] catering. They cater tailgate parties, holiday parties, and also company picnics.

All KERM does is delete the location of the Armadillo Grill and some value-neutral description of the food the Armadillo Grill serves. Both types of information are permissible under the 1986 Public Notice. KERM's edit of Announcement 3 for the Color Shop is equally insubstantial.

That announcement was originally broadcast as follows.

The Color Shop for de-vo paint, for all your paint [and paint] supplies. The Color Shop, 402 West Sunset. Custom color matching, de-vo paint and stains, professional equipment and supplies. The Kissingers have been helping to paint the town for years. De-vo paint and the Color Shop, 756-8760.

KERM believes that, to conform to Commission precedent, Announcement 3 must be modified as follows:

This program is underwritten in part by the Color Shop. The Color Shop provides custom color matching, paints and stains, and professional equipment and supplies.

KERM has deleted the address and phone numbers, which are permissible under the Commission's 1986 Public Notice, and the length of service to the community, which is permissible under Xavier.

KERM's objections to Announcement 6 are equally unavailing. That Announcement originally read:

Northwest Tires is proud to support Springdale Bulldog Football. Northwest Tires carries Toyo open country tires, including the Toyo M410 open country light truck radial. The Toyo M410 open country radial is designed for pickups, vans, and sport utility vehicles with a choice of white outline or black serrated sidewall lettering. Northwest Tires is located at 1809 South Pleasant Street in Springdale. The phone number for Northwest Tires is 751-2700. Northwest Tires backs the Red Dogs.

KERM contends that Announcement 6 would not be lawful unless it was shortened to read:

Northwest Tires is proud to support Springdale Bulldog Football. Northwest Tires carries open country tires. Northwest Tires underwrites broadcasts of the Red Dogs.

Again, the types of information KERM believes should be excised from original Announcement 6 -- street addresses, brand names of products, and phone numbers -- are permissible under Commission precedent.

Moreover, it is apparent from these comparisons that KERM does not dispute that some identification of the underwriters and some value-neutral descriptions of their products and services is appropriate; KERM is essentially arguing that the announcements should be shorter in both areas. KERM's side-by-side comparisons demonstrate that KERM is engaging in a classic line drawing exercise that this Court has repeatedly held is more properly within the Commission's province. See Sinclair Broadcast Group v. FCC, 284 F.3d 148 (D.C. Cir. 2002) (FCC is generally entitled to deference in drawing lines to accomplish "diversity in broadcasting"); AT&T Corp. v. FCC, 220 F.3d 607, 626-27 (D.C. Cir. 2000) (upholding Commission decision that a 90 percent, as opposed to 95 percent, on-time performance rate is sufficient to show that a Bell operating company offered a competitor a meaningful opportunity to compete). This Court does not overturn an exercise in line drawing unless the petitioner can show the lines "have no relationship to the underlying problem." Cassell v. FCC, 154 F.3d 478, 485 (D.C. Cir. 1998) (internal quotations omitted).

Determining when an announcement crosses the line from primarily identifying the underwriter to intentionally promoting the products or services offered by the underwriter is the type of elusive issue in which the line drawing determinations of the Commission should be entitled to considerable deference. As the Commission recognized, interpreting Sections 399A and 399B requires line drawing because Congress enacted the statutes in order to balance "the financial needs of [public broadcast] stations and their obligation to provide an essentially noncommercial broadcast service." Memorandum Opinion and Order, Commission Policy

Concerning the Noncommercial Nature of Educational Broadcast Stations, 90 F.C.C. 2d 895, 51 Rad. Reg. 1567 (1982), ¶3; see also H.R. Rep. No. 97-82, pp. 13-16 (1981). Congress believed that this careful balancing is so difficult that, as previously mentioned (supra, at p. 23), it appointed the TCAF Commission to further study whether noncommercial stations should be permitted to broadcast enhanced underwriting announcements. Memorandum Opinion and Order, Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, 97 F.C.C. 2d 255 (1984), ¶10.

The Commission's determination that the ten announcements are permissible comports with Section 399B's goals of permitting announcements that identify underwriters but prohibiting announcements that are intended to promote the underwriters' products or services. KERM's contention, that the announcements should have had less information that identifies the underwriters and fewer value-neutral descriptions of products, falls far short of showing that the Commission abused its discretion in interpreting the statute.

D. The Agency's Decision Not To Seek Further Enforcement Action Is Unreviewable.

In Heckler v. Chaney, 470 U.S. 721, 738 (1985), the Supreme Court held that a decision not to undertake an enforcement action is analogous to a denial of a reconsideration and, therefore, is presumed to be unreviewable. Id. at 830-32. This presumption against reviewability may only be rebutted when "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Id. at 832. An example of a statute providing enforcement guidelines is one that provides, upon the filing of a complaint, the agency will investigate and if it finds probable cause that a violation has occurred, bring civil action. Id.

at 834. Section 399B of the Communications Act provides no such enforcement guidelines to the Commission.

In its Complaint and Application for Review, KERM requested the Commission to impose a forfeiture against KAYH(FM) for every violation of the prohibition against noncommercial stations broadcasting promotional announcements (JA 5). In this case, the Commission found that only one of the eleven challenged announcements was impermissible (JA 46). Also, the Commission saw no need for enforcement because there was no evidence of the likelihood of future violations (JA 47). To the extent KERM challenges the Commission's decision not to seek further enforcement action against KAYH(FM) for that one violation (Br. 22-23), this Court should dismiss that challenge as unreviewable under Heckler.

CONCLUSION

For the foregoing reasons, this Court should dismiss KERM's petition for review for lack of jurisdiction because KERM lacks standing. Should the Court conclude it has jurisdiction, the Court should deny the petition for review and affirm the Commission's decision.

Respectfully submitted,

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September 8, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KERM, INC.,)
)
 PETITIONER,)
)
 v.)
)
 FEDERAL COMMUNICATIONS COMMISSION AND UNITED) No. 03-1028
 STATES OF AMERICA,)
)
 RESPONDENTS.)
)
)
)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee" in the captioned case contains 8209 words.

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