

Before the
Federal Communications Commission
Washington, DC 20554

In re)	
)	
Paxson Communications License)	
Company, LLC and Minden)	BALCT-20030820ACM
Television Corporation, Application)	
for Assignment of License of)	
KPXJ(TV), Minden, Louisiana)	

TO: The Commission

**REPLY TO OPPOSITION TO PETITION TO
DENY OF THE CHRISTIAN NETWORK, INC.**

Petitioner Common Cause respectfully replies to the December 23, 2003 *Opposition to Petition to Deny* filed in this proceeding by The Christian Network, Inc. (“CNI”).¹

The CNI opposition largely repeats matters which have already been addressed elsewhere. Common Cause will not burden the record by rehashing them here.² However, CNI does make new legal arguments at pages 17-21 of its *Opposition*, under the heading “MAP’s Call for a Hearing must Be Rejected Because the Issues Re-raised by MAP Will Be Addressed in the *NASA Proceeding*.” Because the position advanced therein is so outside the realm of basic jurisprudence under the Communications Act, it is necessary to discuss them briefly.

CNI says that in the related KPXF-TV (Porterville, CA) matter, the Bureau properly followed “the Commission’s policy for commencing separate proceedings to examine and analyze tangential

¹On December 2, 2003, Common Cause filed a *Contingent Waiver and Request for Extension of Time Within Which to Filed Reply to “Opposition to Petition to Deny”* in which, *inter alia*, it asked for an extension through and including January 16, 2004 within which to submit a response. As of this date, counsel is unaware of any action taken on this request.

²Nor is it necessary for Common Cause respond to Paxson’s increasingly choleric and dyspeptic fulminations spewed forth most recently in letters dated December 19, 2003 and January 5, 2004. Incivility is no substitute for reason.

matters, as well as the Commission's general unwillingness to open evidentiary hearings on grounds of technical or legal violations absent misrepresentations or lack of candor." *Opposition*, p. 19. It argues that the Bureau should do what it did in the KPXF-TV case, *i.e.*, grant the pending application before completing its investigation of questions Common Cause has raised. *Id.*, pp. 19-20. It says that a hearing is needed only "to examine very serious allegations that go to a licensee's basic qualifications...", *id.*, p. 20, and adds (incorrectly) that the assignee's basic qualifications have not been placed at issue here.

CNI's characterization of the law is fundamentally at odds with plain language of the most important provisions of the Communications Act and judicial and agency precedent of long standing. It makes two fundamental errors. *First*, while the Commission surely must designate a hearing when there are credible allegations that an applicant is unqualified, that is hardly the only circumstance when a hearing must be convened. *Second*, CNI appears to assume that if the Commission is unable to determine whether a hearing is required, it is free to grant an application.

First, the FCC may not grant any application, even to a fully qualified applicant, if grant of the application would be contrary to the public interest. Section 309(a) permits the Commission to grant broadcast license applications *only* if it can find on the basis of the record "that the public interest, convenience, and necessity would be served by the granting" of the application. Sections 309(d)(2) and Section 309(e) provide that "if the Commission *for any reason* is unable to find that grant of the application would be consistent with [the public interest]," it "*shall* formally designate the application for hearing...." (emphases supplied)

There is absolutely no basis for stating that the Commission has discretion to grant an assignment when it is unable to make the necessary affirmative determination that grant of the

application is in the public interest. Nor is there any precedent for CNI's astounding claim that if the applicant is minimally qualified to be a licensee, the Commission must grant the application. Each of the cases cited by CNI (and earlier by Paxson) are cases in which the Commission was able to make a finding on the record that grant of the application was in the public interest and for that reason, considered alleged misconduct or other practices separately as enforcement matters which might be resolved with forfeitures or other lesser sanctions. The critical distinction is that the staff has *not* determined that the so-called CNI programming agreement at issue in this case is consistent with the public interest. To the contrary, the Bureau has indicated that there are serious unresolved issues as to whether the contract to be assumed in this case can be reconciled with the public interest standard.

Decades of case law support Common Cause:

The grounds for holding a renewal hearing are spelled out plainly both in the statute and in [judicial] decisions: a hearing is required when a petition to deny raises a "substantial and material questions of fact" *or* when the Commission *for any reason* is unable to find that license renewal will serve the "public interest, convenience, and necessity."

Bilingual Bicultural Coalition on Mass Media v. FCC, 595 F.2d 621, 630 (D.C. Cir. 1978) (*en banc*). (emphasis supplied). CNI's claim is directly governed by the D.C. Circuit's holding in the landmark *UCC* decision. In that case, the Commission had claimed that "it accepted all Appellants' allegations...and that for this reason no hearing was necessary." The Court of Appeals, per Burger, J., reversed, holding that where the disputed conduct "would preclude the statutory finding of public interest..." the Commission cannot grant the application. *UCC v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1965). *See also, Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 259 (D.C. Cir. 1973).

Second, when the Commission is unable to make the requisite public interest findings, it has discretion to investigate further, rather than immediately designate a hearing, but it may **not** grant the application. *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *see also Bilingual Bicultural Coalition on Mass Media v. FCC*, 492 F.2d 656 (D.C. Cir. 1974). Thus, “evidence that...may not in itself necessarily require resolution at a hearing, should at least put the FCC on notice that more information is required before the license renewal application can be granted.” *Bilingual Bicultural Coalition on Mass Media v. FCC*, 595 F.2d at 629-630. Under those circumstances,

[t]he Communications Act expressly permits the FCC to conduct further inquiry if it believes that more information is necessary before it can dispose of a license renewal application. *See* 47 U.S.C. §308(b)....*See NOW [v. FCC*, 555 F.2d [1002,] 1018 [(D.C. Cir. 1977)](“If the Commission here...had not itself sought out more detailed data (regarding the station's) hiring and promoting(,) it may have been under some obligation to NOW to afford it some discovery . . . so that the effectiveness of (the station's) EEO plan could be fairly assessed.”) (footnote omitted).

Id., 595 F.2d at 640, n. 34.

Moreover, far from placing the burden on Common Cause, the Communications Act places the burden on the applicants to establish that grant of the application is in the public interest, and “the statute contemplates that * * * the Commission inquiry will extend beyond matters alleged in the protest in order to reach any issue which may be relevant in determining the legality of the challenged grant.” *LB Wilson, Inc. v. FCC*, 397 F.2d 717 (D.C. Cir. 1967) (quoting *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 515 (D.C. Cir. 1955)).

The statute demands far more than minimally qualified applicants. There has been no determination that the highly questionable contractual provisions employed in this case are consistent with the public interest. Absent such a finding, the Commission cannot grant the application.

CONCLUSION

Accordingly, the Commission should grant the Petition to Deny and dismiss the application or designate it for hearing, and grant all such other relief as may be just and proper.

Respectfully submitted,

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January 16, 2004

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Reply to Opposition to Petition to Deny of the Christian Network, Inc.* has been served upon the persons named below by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this 16th day of January, 2004:

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