

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

In the Matter of)	
)	
Application of Fox Television Stations, LLC)	MB Docket No. 23-293
for Renewal of License of WTXF-TV,)	
Philadelphia, Pennsylvania)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS AND THE
PENNSYLVANIA ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (NAB)¹ and the Pennsylvania Association of Broadcasters (PAB)² urge the Commission to reject the petition to deny Fox Television Stations, LLC’s application to renew the license of WTXF-TV, Philadelphia, filed by the Media and Democracy Project, *et al.*, and related informal objections.³ Among other defects, these filings virtually ignore the proper focus for broadcast license renewals, as established in the Communications Act of 1934 (Act), and try to improperly expand the scope of the FCC’s broadcast news distortion policy, contrary to the FCC’s authority and the First Amendment.

Although NAB and PAB do not usually comment in FCC broadcast station license renewal proceedings, the factually and legally infirm Petition to Deny raises issues and makes arguments that concern *all* broadcast licensees, which similarly must seek to renew

¹ NAB is a nonprofit association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² PAB, the nation’s first state broadcast association, endeavors to promote collaboration between radio and television broadcast station owners, managers, and staff across the Commonwealth. It assists member stations in serving their communities, audiences, and advertisers through FCC-licensed free, over-the-air broadcast program operations.

³ The Media and Democracy Project, *et al.* (Petitioners), Petition to Deny, MB Docket No. 23-293 (July 3, 2023) (Petition).

their licenses every eight years. Most notably, the Petition and its supporting materials have virtually nothing to do with WTXF-TV. Instead, the Petition objects to the programming aired on a *cable news channel*, a national subscription platform that serves a purpose distinct from local broadcasters under the Act.

Given the Petition's overall non-broadcast concerns and its myriad faults, the Commission must dismiss it. Declining to dismiss a petition to deny that fails to meet its burden of presenting a *prima facie* case for challenging a broadcast station's license renewal application is not only contrary to the Act, but also risks setting a factually, legally, and constitutionally suspect precedent to the potential future detriment of thousands of stations that serve their communities and deserve timely renewal of their licenses.

I. THE PETITION VIRTUALLY IGNORES THE PROPER FOCUS OF BROADCAST LICENSE RENEWAL PROCEEDINGS

Under the Act, the proper focus of a station's license renewal proceeding should be the service that the station provided to its community of license over the previous eight years. Section 309(k) of the Act requires the Commission to grant a station's license renewal application "if it finds, with respect to that *station*," during the preceding license term, that the "*station* has served the public interest, convenience, and necessity" and that there have been no serious violations by the station licensee of the FCC's rules and regulations and no other rule violations by the licensee which, taken together, would constitute a pattern of abuse.⁴ But this Petition is focused on content that aired on a national cable news network and is supported by material about a defamation lawsuit involving non-broadcast content

⁴ 47 U.S.C. § 309(k) (emphases added). In fact, the entire broadcast licensing system is predicated on the grant and renewal of licenses for stations serving local communities. The Act directs the FCC, in considering applications for licenses, and modifications and renewals thereof, to fairly, efficiently, and equitably distribute licenses among the States and communities. 47 U.S.C. § 307(b).

carried on outlets *other* than WTXF. Indeed, it appears that Petitioners targeted WTXF because it was the only pending license renewal application associated with Fox Television Stations, LLC, and not due to material actually aired by the station itself.⁵

The Petition identifies no specific content WTXF aired that allegedly failed to serve the local community, let alone would justify failing to grant the application and designating it for hearing. At most, the Petition (at 6) makes general allegations against a single weekly program that aired on WTXF without identifying any specific segments or content on that program (or, of course, without explaining how airing that unidentified content alone warranted a hearing designation). That is wholly insufficient. And even if the Petition had provided relevant information about the program in question, a licensee is “held accountable for the *totality* of its performance of public interest obligations,”⁶ and not for its decision to air a particular program.⁷

Given the paucity of the Petition’s (and related informal objections’) references to, and non-existent evidence about, WTXF’s programming services over the relevant eight-year period, the Commission must assume that Petitioners cannot establish that the station’s programming failed to serve its local community. The Commission therefore must dismiss

⁵ See Petition at 1 and n.1.

⁶ *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 121 (1973) (emphasis added).

⁷ See, e.g., *In re Application of WGBH Educational Foundation*, 69 FCC 2d 1250, 1251 (1978) (in determining whether a licensee has served the public interest, “consideration of a licensee’s programming is and must be limited to determining whether the licensee’s *overall* programming has served its service area, and not whether any particular program is ‘appropriate’”) (emphasis in original); *In re Applications of Certain Broadcast Stations Serving Communities in the State of Louisiana*, 7 FCC Rcd 1503, 1507 (1992) (in determining during license renewal process whether a licensee served the public interest, the FCC “focuses on whether the licensee has made a reasonable effort in its overall programming,” and a petitioner’s allegations focusing on a single programming decision of the licensee did not indicate that the stations’ “overall programming reflects any abuse of licensee discretion or failed to respond to community problems”).

the Petition as failing to meet the statutorily-imposed “heavy burden” on those “submitting a petition to deny.”⁸ Beyond complying with the Act, the FCC’s “policy of requiring a substantial prima facie case before proceeding against a broadcaster . . . reflects an appropriate respect for First Amendment values.”⁹ Declining to dismiss this deficient Petition would set a factually and legally erroneous precedent likely to harm other broadcasters seeking to renew their licenses in the future.

II. THE PETITION ATTEMPTS TO IMPROPERLY EXPAND THE SCOPE OF THE COMMISSION’S BROADCAST NEWS DISTORTION POLICY

For similar reasons, the Petition’s claims (at 12-13) about violations of the FCC’s broadcast news distortion policy are inapposite. Given that the cable-focused Petition did not identify any specific material that aired on WTXF, it obviously failed to identify any content that constituted *broadcast* news distortion.¹⁰

The Petition’s objections to the content on a cable network are inapplicable to claims of broadcast news distortion. As the Commission itself has made clear, the news distortion policy “applies only to the broadcast medium, which means that the FCC has no power to enforce it against cable news networks, newspapers or newsletters (whether online or print), social media platforms, online-only streaming outlets or any other non-broadcast news platform.”¹¹

⁸ *Cal. Public Broad. Forum v. FCC*, 752 F.2d 670, 674 (D.C. Cir. 1985) (describing the statutory standard for petitions to deny broadcast applications under § 309(d) of the Act).

⁹ *Galloway v. FCC*, 778 F.2d 16, 23 (D.C. Cir. 1985).

¹⁰ See FCC Consumer Guide, *Broadcast News Distortion*, at 1 (Aug. 31, 2022) (stating that the FCC will investigate a [broadcast news distortion] claim only if it *first* receives evidence, in addition to the broadcast itself, that makes a ‘substantial showing’ that a broadcast news report was deliberately intended to mislead viewers or listeners”) (emphasis in original), available at <https://www.fcc.gov/broadcast-news-distortion>.

¹¹ *Id.*

Even assuming the news distortion policy’s legality and constitutionality in the broadcast context (which NAB and PAB do not address here), the FCC admittedly lacks authority to enforce it against non-broadcast media, and the courts would strike down its expanded application to other media as a content-based restriction contrary to the First Amendment.¹² And the Commission, consistent with the limits on its authority and the Constitution, cannot expand its news distortion policy to non-broadcast outlets by directly or indirectly imputing the content of such outlets to specific broadcast stations in the context of a license renewal proceeding. “What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.”¹³

Given the Petition’s failure to establish that WTXF engaged in news distortion, it, moreover, has failed to plead a *prima facie* case of relevant FCC-related misconduct sufficient to raise a character issue and thus designate the station’s license renewal application for hearing. And a partial summary judgment decision on a civil defamation claim involving material carried on a cable network fails to establish a *prima facie* case of non-FCC related misconduct under relevant FCC precedent, despite the Petition’s claims.¹⁴

¹² See, e.g., *Turner Broad. Systems, Inc. v. FCC*, 512 U.S. 622, 637 (1994) (stating that the “rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation”); *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997) (concluding that precedent relating to broadcast media provided no basis for qualifying the level of First Amendment scrutiny that should be applied to the internet); *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (stating that content-based restrictions are presumptively unconstitutional and subject to strict scrutiny).

¹³ *Rutan v. Republican Party*, 497 U.S. 62, 77-78 (1990).

¹⁴ See Petition at 13 and n.20. Petitioners and informal objectors are now seeking to expand this license renewal proceeding even further beyond WTXF by urging the FCC to consider unresolved civil litigation not pertaining to the station, including recent complaints filed in Delaware Court of Chancery shareholder derivative lawsuits. See Letter from E.S. Duggan and W. Kristol to Marlene Dortch, Secretary, FCC, MB Docket No. 23-293 (Oct. 9, 2023); Media and Democracy Project, Motion for Production of Documents, MB Docket No. 23-293 (Oct. 9, 2023). Moving further afield does not aid the Petitioners’ cause.

The Commission should reject Petitioners' invitation to reinterpret the FCC's character policies – which apply to all broadcast licensees – in the context of a single station's license renewal proceeding. To properly reexamine its long-standing policies on character qualifications in broadcast licensing, the FCC should conduct a general notice and comment proceeding focused on those policies and permitting sufficient time for all interested parties to participate.¹⁵

III. CONCLUSION

In addressing the Petition here, NAB and PAB urge the Commission not to lose sight of the main point of this and any broadcast license renewal proceeding – the service that the station at issue has provided to its local community of license over the previous eight years. Because the Petitioners virtually ignore that vital question, the Commission could dismiss the Petition on that basis alone, although the Petition suffers from other serious defects, as discussed above. The Commission should deny the request to designate WTXF's license renewal application for hearing and return the focus of this station's renewal to its service to the viewing public in Philadelphia. Failing to do so would invite the submission of other non-meritorious oppositions to broadcast stations' license renewals in the future, to the potential significant detriment of broadcasters who work every day to serve their local communities.

Respectfully submitted,

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¹⁵ See *In re Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 100 FCC 2d 1179 (1986); *In re Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252 (1990).



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October 11, 2023