

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

In re Applications of
WQED PITTSBURGH
(Assignor)
and
CORNERSTONE TELEVISION, INC.
(Assignee)
For Consent to the Assignment of License
of Noncommercial Educational Station
WQEX(TV), Channel *16, Pittsburgh,
Pennsylvania
CORNERSTONE TELEVISION, INC.
(Assignor)
and
PAXSON PITTSBURGH
LICENSE, INC.
(Assignee)
For Consent to the Assignment of License
of Station WPCB-TV, Channel 40,
Greensburg, Pennsylvania
File No. BALET-970602IA
Facility ID Number 41314
File No. BALCT-970530IA
Facility ID Number 13924

ORDER ON RECONSIDERATION

Adopted: January 28, 2000

Released: January 28, 2000

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement; Commissioner Tristani dissenting and issuing a statement.

1. By Memorandum Opinion and Order released December 29, 1999, the Commission granted the above-captioned applications for consent to the assignment of licenses of

1 WQED Pittsburgh (FCC 99-393); Chairman Kennard and Commissioner Tristani affirming in part, dissenting in part, and issuing a joint statement; Commissioners Furchtgott-Roth and Powell affirming in part, dissenting in part, and issuing a joint statement; Commission Ness issuing a separate statement.

noncommercial educational television station WQEX(TV), Channel *16, Pittsburgh, Pennsylvania, from WQED Pittsburgh to Cornerstone TeleVision, Inc. and of television station WPCB-TV, Channel 40, Greensburgh, Pennsylvania, from Cornerstone to Paxson Pittsburgh Licensee, Inc. We also denied, *inter alia*, the petition to deny filed by The Alliance for Progressive Action and QED Accountability Project. By letter dated January 18, 2000, Cornerstone notified the Commission that it had terminated the agreements underlying the above-referenced transactions, and requested dismissal of its applications to acquire Channel *16 from WQED Pittsburgh and assign Channel 40 to Paxson.

2. On our own motion, pursuant to 47 C.F.R. § 1.108, we hereby reconsider and vacate our decision, insofar as it provided additional guidance regarding compliance with Section 73.621(a), 47 C.F.R. § 73.621, of the Commission's rules.² See *WQED Pittsburgh* at ¶¶ 43-44 and n.77. In an attempt to clarify what constitutes non-commercial educational programming, we offered additional guidance broadly, and attempted to apply that guidance to specific cases involving religious programming. Regrettably, it has become clear that our actions have created less certainty rather than more, contrary to our intent.

3. In hindsight, we see the difficulty of minting clear definitional parameters for "educational, instructional or cultural" programming, particularly without the benefit of broad comment. Therefore, we vacate our additional guidance. We will defer to the editorial judgment of the licensee unless such judgment is arbitrary or unreasonable. *Way of the Cross*, 101 FCC 2d 1368, 1372, n. 5 (1985), citing *Notice of Inquiry* in Docket No. 78-164, 43 Fed. Reg. 30842, 30844-45 (1978).

4. We wish to emphasize that our action here does not rescind or alter the underlying grant of the above-captioned applications.

5. The Commission has already received many communications from members of the public and others concerning this proceeding. Insofar as these presentations directly and primarily relate to the general policy question of appropriate standards for evaluating programming proposals for reserved noncommercial educational television channels, while incidentally mentioning the captioned application proceeding, they will be governed by the Commission's permit-but-disclose ex parte procedures as set forth in 47 C.F.R. 1.1206(b) and placed in a file associated with the record concerning the captioned applications. Any similar communications received in the future will be treated in the same manner. All persons are reminded, however, that the matter involving the captioned applications remains a restricted proceeding under 47 C.F.R. 1.1208, until such time as the proceeding on the assignment applications is formally terminated and no longer subject to Commission or court review. Thus, any written presentations directly addressing the merits or outcome of those applications must be served on all parties to that proceeding. Similarly, no such oral presentations concerning the applications may be made without advance notice to all parties and an opportunity for them to be present.

² Section 73.621(a) provides, with limited exception, that "noncommercial educational television broadcast stations . . . will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community"

6. Accordingly, IT IS ORDERED, that pursuant to 47 C.F.R. § 1.108, the above-referenced portion of the Commission's decision in *WQED Pittsburgh* IS RECONSIDERED and VACATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

In re Applications of WQED Pittsburgh and Cornerstone Television, Inc. For Consent to the Assignment of License of Noncommercial Educational Station WQEX(TV), Channel 16, Pittsburgh, Pennsylvania; Cornerstone Television, Inc. and Paxson Pittsburgh License, Inc. For Consent to the Assignment of License of Station WPCB-TV, Channel 40, Greensburg, Pennsylvania

**Order on Reconsideration
Concurring Statement of Commissioner Harold W. Furchtgott-Roth**

I concur in the Commission's judgment to vacate the "additional guidance" section of the original decision in this matter. I do so because that guidance was wrong on the merits, raising the specter of viewpoint discrimination against religious broadcasters in violation of the First Amendment, not because it provided insufficient clarity. *See* Order on Reconsideration at para. 2 ("Regrettably, it has become clear that our actions have created less certainty rather than more, contrary to our intent.").

Quite the opposite, it seems to me that the Commission's further statements on the "educational" nature of religious programming were all too well apprehended by regulated entities, the public, and their elected representatives.¹ It was not for lack of clarity that these parties objected to the decision but for infringement of freedom of speech and freedom of religion – and rightly so.

Nor do I vote to vacate because the Commission's error only became apparent after the original decision was adopted. *See id.* at para. 3 ("*In hindsight*, we see the difficulty of minting clear definitional parameters for 'educational, instructional, or cultural' programming. . .").(emphasis added). The many and grave problems occasioned by direct review of religious programming for educational purpose were plainly perceptible when the Commission first set forth its "additional guidance." That is why I voted against it then, and why I vote to remove it from our books now.²

Finally, as a result of the Commission's express rejection and vacatur of this guidance, there should be no doubt that the Mass Media Bureau is unauthorized to engage in any formal or

¹ Reaction against this decision was swift, strong, and voluminous. In the past two weeks alone, I have received more than 1,000 messages from opposed citizens. Many members of Congress have also voiced their strong objections in letters to the Commission; in fact, legislation to counteract the decision was introduced almost immediately after its release.

²Fortunately for religious entities that intend to apply for low power radio licenses, which are available only on the noncommercial educational reserved band, this action makes it easier for them to receive such licenses. *Cf.* Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, *In the Matter of Creation of Low Power Radio Service*, MM Docket No. 99-25 (Jan. 20, 2000) (observing that under the WQED Order "the broadcast of religious services may not count towards the required amount of educational programming that [church groups] must air in order to retain their [low power] licenses" and noting that Commission's "goal of creating low power stations for use by churches and church groups" was hampered by the decision).

informal practice of directly reviewing the substance of stations' programming or imposing a quantification requirement on educational programming -- suggesting, for instance, the addition of certain shows or the deletion of others from a programming schedule in order to obtain licensing approval. Instead, as this Order on Reconsideration states, the Bureau's task is simply to assess whether the broadcaster's judgment that his station will be used chiefly to serve the educational needs of the relevant community is arbitrary or unreasonable. But anything more in the way of programming content review or programming quantification would be unwarranted, improper, and in derogation of this Order on Reconsideration.

DISSENTING STATEMENT OF COMMISSIONER GLORIA TRISTANI

Re: Applications of WQED Pittsburgh and Cornerstone Television, Inc.

This is a sad and shameful day for the FCC. In vacating last month's "additional guidance" on its own motion, without even waiting for reconsideration petitions to be filed, this supposedly independent agency has capitulated to an organized campaign of distortion and demagoguery.

At bottom, the additional guidance provided in last month's decision stood for one simple proposition: not all religious-oriented programming will count toward the requirement that reserved television channels be devoted primarily to "educational" use. This is nothing new. For over twenty years, the Commission's precedent has held that "[w]hile not all religious programs are educational in nature, it is clear that those programs which involve the teaching of matters relating to religion would qualify."¹ What was new was that the Commission attempted to give some clarity to its precedent in order to assist its licensees and the public, and, more importantly, to ensure that the reserved channels are used for their intended purpose.²

Then the pressure campaign began. It was alleged that the Commission was barring certain religious programming from the reserved channels. Not true – the Commission simply held that not all religious programming would count toward the "primarily educational" requirement. Then it was alleged that the Commission was somehow restricting religious speech, or engaging in a prior restraint. Again, not true – the decision only dealt with the small number of television channels set aside for noncommercial educational use. Religious broadcasters are free to broadcast whatever they wish on commercial channels. Indeed, Cornerstone has been broadcasting unimpeded on a commercial television channel in Pittsburgh since 1978. In this case, Cornerstone was seeking a special *privilege* from the government – the right to broadcast on a channel reserved primarily for public education. The government may selectively promote certain speech (e.g., public educational speech) without thereby abridging other types of speech (e.g., religious speech).³

¹ See *Notice of Inquiry*, Docket No. 78-164, 43 Fed. Reg. at 30845 (1978) (setting forth processing standards for reserved channels).

² For example, the Commission stated that a program analyzing the role of religion in connection with historical or current events, various cultures, or the development of the arts generally would qualify as educational, while church services generally would not.

³ See, e.g., *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 2179 (1998) ("Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.'") (citing *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)). See also *Finley*, 118 S.Ct. at 2183 (Scalia, J., concurring) ("It is preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the suppression of dangerous ideas'") (citations omitted).

Perhaps the most disturbing charge leveled against the Commission is that its decision reflects an “anti-religion bias” at the agency. I reject and resent this type of attack, reminiscent of a witch-hunt. It is precisely because of my deep respect for religion, and my deep appreciation for the religious diversity of America, that I supported our additional guidance. Religion is not merely an educational “interest” like cooking or computers that may appeal to only a subset of the population. Religion is much more than that. The freedom to believe, and the freedom to believe in nothing at all, is one of our most precious freedoms. In order to preserve that freedom, the Establishment Clause of the First Amendment precludes the government from aiding, endorsing or opposing a particular religious belief, or from promoting belief versus non-belief. As Justice O’Connor recognized: “[T]he endorsement standard recognizes that the religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others.”⁴ Moreover, government endorsement of a particular set of religious beliefs sends a powerful message of exclusion to non-adherents. Again, Justice O’Connor:

Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.⁵

Here, the government reserves a small number of TV channels in a community for educating the public. These channels are quite valuable – Cornerstone planned to move to the noncommercial channel free of charge while selling its commercial channel for \$35 million. Because of their scarcity, the reserved channels are expressly intended “to serve the *entire* community to which they are assigned,”⁶ and to be “responsive to the overall public as opposed to the sway of particular political, economic, social or religious interests.”⁷ Thus, a prospective licensee cannot operate on a reserved channel unless and until the government concludes that its programming is primarily “educational” for the broader public.

In a religiously diverse society, sectarian religious programming, by its very nature, does not serve the “entire community” and is not “educational” to non-adherents. From a constitutional perspective, a government policy that endorses certain sectarian programming as “educational,” and awards exclusive use of a scarce public resource to permit those views to be expressed, would run afoul of the Establishment Clause. Indeed, programming that promotes adherence to a particular set of religious beliefs “inevitably ha[s] a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The

⁴ *County of Allegheny v. ACLU*, 492 U.S. 573, 631 (1989) (O’Connor, J., concurring). See also *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 747 (1976) (“the state must confine itself to secular objectives and neither advance nor impede religious activity”).

⁵ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

⁶ *Fostering Expanded Use of the UHF Channels*, 2 FCC 2d 527, 542 (1965) (emphasis added).

⁷ *Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d 895, 900 (1982).

Establishment Clause does not allow public bodies to foment such disagreement.”⁸ It is no answer to say that non-adherents need not watch those channels. That is like saying that the government can provide direct aid to the religious mission of sectarian schools because non-adherents can enroll elsewhere. Nor is it an answer to say that *all* religious programming is “educational.” First, the scarcity of reserved channels means that, as a practical matter, the government would be aiding and endorsing certain religious beliefs and not others. Second, the Establishment Clause not only prohibits government from aiding or endorsing a particular set of religious beliefs, it also prohibits government from aiding or endorsing religion over non-religion (or vice versa).

The majority clearly wishes that this entire subject would just go away. That has been the Commission’s unspoken policy through the years, and would have remained the policy had the people of Pittsburgh not pressed the issue. Now, having stuck their head out of their foxhole and drawing fire, the majority is burrowing back in as quickly and deeply as they can. The excuse for vacating the additional guidance – that our actions “have created less certainty rather than more” – would be laughable were the stakes not so high. The problem was not a lack of clarity, but that we were *too* clear. We actually tried to give meaning to our rule. What the majority really means is that they prefer a murky and unenforceable rule to a clear and enforceable one. Indeed, if our decision created uncertainty, the answer would be further clarification, not to vacate. The majority insists that it would like to have “the benefit of broad comment.” But where, one may ask, is the notice of rulemaking? The seriousness of the majority’s rulemaking argument can be judged by how quickly it begins a proceeding. I doubt that a rulemaking on this subject will ever see the light of day.

In the end, the majority’s decision takes us back to where we were before this case began. Programming on the reserved channels still must be primarily educational. Programming about religion may still qualify as educational, but not all religious programming will qualify. The only difference now is that neither licensees nor the public will have the benefit of specific guidance. The majority’s mantra that we will defer to the licensee’s judgment unless that judgment is “arbitrary or unreasonable” simply begs the question – when does a licensee’s judgment cross the line and become arbitrary or unreasonable? The majority provides no clue. I cannot see how anyone is better off, other than those who oppose any enforceable rules in this area. I, for one, will continue to cast my vote in accordance with the views expressed in the additional guidance and in this statement.

⁸ *County of Allegheny*, 492 U.S. at 651 (O’Connor, J., concurring).