

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of

PACIFICA FOUNDATION)	File No. 0000180618
WBAI (FM-Ed), New York, NY)	Facility ID Number 51249
For Renewal of License)	
)	
To: The Commission;)	
Chief, Audio Division, Media Bureau)	

REPLY IN SUPPORT OF PETITION TO DENY

Pacifica Safety Net (“PSN” or “Petitioner”) hereby submits its Reply to Pacifica’s June 1, 2022, Opposition to our Petition to Deny previously submitted in the above-captioned matter.

I. INTRODUCTION

Because Pacifica does not and cannot challenge the factual assertions set forth in the Petition to Deny concerning WBAI’s ongoing violations, its perfunctory Opposition instead attempts to challenge PSN’s standing to file the Petition, and to claim that Petitioner’s arguments amount to little more than “policy differences” over programming. Pacifica’s defense of for-profit fundraising schemes by its program hosts as little more than standard “pledge drives” is unpersuasive. Indeed, Pacifica tacitly acknowledges that one fundraising scheme involving in-person retreats by program host Gary Null violated payola and plugola rules. Given WBAI’s unconvincing promise that it “does not anticipate offering it again anytime in the future” and its ongoing violations, it is clear that a hearing into the station’s conduct is warranted for the reasons stated in our Petition.

II LEGAL ARGUMENT

A. PETITIONER HAS STANDINIG TO CHALLENGE WBAI’S RENEWAL

The facts submitted in the Petition to Deny are more than sufficient to establish standing. This is because “the standing of one member is sufficient to confer standing on the association itself.” *Id.* As the Commission itself noted in *In the Matter of Petition for Rulemaking to*

Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application, 82 FCC 2d 89, 96 (1980).

There is no question that an association may have standing in its own right to seek judicial relief from injury to itself, and to vindicate its own rights. Even in the absence of injury to itself, however, an association may establish standing as the representative of its members, as long as it alleges that one or more of its members has standing, and the nature of the claim and the relief sought does not make the individual participation of each injured party indispensable to the resolution of the lawsuit. (Citing Warth v. Seldin, 422 U.S. 490, 511 (1975)).

The Commission has previously granted standing, notwithstanding a lack of information about petitioning groups, upon finding that one or more members of the petitioning group has standing, *In re: Applications of WDOD of Chattanooga, Inc.*, 12 FCC Rcd 6399, 6400 (1997). *See also, In re: Application of Nancy Kaleszkiewicz*, 5 FCC Rcd 7131 (1990) (“The standing of one member is sufficient to confer standing on the association itself”). Accordingly, Petitioner retains standing as a representative of the public interest in its Petition.

Here, Pacifica argues Petitioner lacks standing based solely on the argument the Pacifica Safety Net members residing within WBAI’s broadcast radius are merely identified in the Declaration of Sherry Gendelman, rather than in separate affidavits signed by each of them. Accordingly, Petitioner attaches hereto separate declarations for each of those previously identified local New York area PSN members, who reside within the broadcast radius of WBAI, thereby mooting Pacifica’s argument.

B. THE PETITION IDENTIFIES SERIOUS AND REPEATED VIOLATIONS OF COMMUNICATIONS ACT AND FCC RULES

Pacifica next attempts to argue, pp. 3-4, that the Petition represents little more than a private dispute between the parties concerning corporate governance and programming policies. In support of this feeble argument, Pacifica cherry-picks two sentences from the Petition (out of context) while essentially avoiding Petitioner’s substantive arguments and exhibits documenting WBAI’s serious and repeated violations of the Communications Act and FCC rules. These violations were committed throughout the prior license term with the knowledge and encouragement of Pacifica management, and indeed, Pacifica acknowledges one of the major

violations in its Opposition at fn. 24, involving direct payments to the advertiser, with the weak claim that it “does not anticipate” repeating this practice in the future.

As the facts set forth in the Petition demonstrate, this dispute has nothing to do with “format decisions” and everything to do with violations of rules prohibiting the use of NCE airwaves to advertise. Let us be clear. If the advertising we identified were for pro-social and worthy goods and services, having obvious benefit to the listener-customer, our objection would be unaffected. These are serious departures from what is required on a noncommercial, educational station.¹ The violations are substantive and numerous enough to warrant designation of a hearing by Commission to determine whether they are sufficiently common and serious to preclude renewal without investigation.

C. WBAI’S ILLEGAL “PLEDGE DRIVES” CONSTITUTE DE FACTO PAID PROGRAMMING AND UNDERWRITING

The Opposition entirely fails to address Petitioner's claims regarding commercialization. The claim, at pp. 4-5, is that, because Pacifica does not accept any paid or sponsored programming, it is impossible to find that it has violated the underwriting rules. “Similarly, because WBAI does not carry any on-air underwriting announcements to acknowledge contributor support, it is not possible for WBAI to have violated the Commission’s underwriting rules.” Opposition at p. 5.

This claim will only work if the Commission is willing to recognize a carve-out of fundraising drives, granting the NCE licensee total freedom to engage in classic selling techniques such as calls to action, claims of bargain pricing, and long-form descriptions of product effectiveness. Such a categorical exemption from underwriting guidelines has never been FCC policy.

1. See e.g., *Southern Rhode Island Public Radio Broadcasting, Inc.*, DA 00-1011 (EB, released May 9, 2000) (“Although contributors of funds to a noncommercial station may receive on-air acknowledgements, the Commission has unequivocally stated that such acknowledgements may be made for identification purposes only and should not promote the contributor's products, services, or business. Specifically, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease. See *Public Notice, In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations* (1986), republished, 7 FCC Rcd 827 (1992)”).

PSN's complaint centers on the approach WBAI has taken to its fundraising drives. In the typical pledge drive, a Station will obtain premiums such as books directly from the publisher or author, at low or reduced cost. These are then offered as a "gift" to donors who make pledges, generally well in excess of value of the premium. The announcement may have an indirect effect of enhancing the author's reputation, but no incidental sale is triggered because the listener actually receives the book that was described. In other cases, the Station may directly purchase premiums such as branded coffee mugs or T-shirts, from a company that produces such products, at a negotiated bulk order price. The supplier is not a donor and generally is not acknowledged as such.

The practice of WBAI is quite different. Entire pledge breaks of 30 minutes or more are devoted to singing the praises of a single concoction or remedy. The full price is mentioned many times, and the program host (Seller) frequently has a vested commercial interest in the product. The Opposition admits that the station does not maintain any inventory of the promoted drug. When the listener responds and contacts WBAI to purchase the item, the payment is sent to the Station but is then split between the Seller and the station. The fulfillment is done by WBAI, after the product is shipped to them by the Seller. The Opposition, by stating that the cost of the premium is set at an amount that exceeds WBAI's cost associated with that premium, ignores the only cost that matters – the station's misuse of its air as advertising time.

There is no way to view this approach as anything but a program-length commercial. In advertising parlance it is "per inquiry" - the Station gets paid only as and when a customer buys the product from the advertiser. The Station receives the payment and remits the principal amount to the advertiser, less an agreed amount that is, effect, the station's sales commission. Whether that commission in percentage terms is large or small really is immaterial. Either way, this structure of sales is a direct affront to the rules against commercialization. The violation is only made worse by the relentless over-the-top barking and braying of the announcer, with extreme claims of the drug's efficacy and incessant mention of the price. Never is the apportionment of the proceeds between the advertiser and the station explained to the listener.

The Opposition, in denying that these sales appeals are underwriting announcements, puts itself in a bind. The Communications Act provides that "No public broadcast station may make

its facilities available to any person for broadcasting an advertisement.” 47 USC Sec. 399 (b)(2). In the Section “advertisement” means “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,” Sec. 399 (a)(1). The Statute then recognizes an exception, enabling stations to receive underwriting contributions -- “to engage in the offering of services, facilities or products in exchange for remuneration.” Sec. 399(b)(1). The distinction is in intent of the parties. If the station is receiving remuneration that is intended to benefit the station in some way, this is permitted and, within strict guidelines, it can and must be acknowledged. If the remuneration is to pay for a message that is intended to promote a commercial service or product, it constitutes a forbidden advertisement.²

The Opposition, by denying that the announcements documented in our exhibits are permitted underwriting announcements, raises the question: What then are they? The answer is that they are advertising – advertising in structure, advertising by intent, and advertising in their purposes.³

2. See, *Daystar Public Radio, Inc., (WKSG, Cedar Creek, FL)* (EB, July 8, 2002) , DA 02-1580 (EB), noting that “the Commission has narrowly construed what constitutes permissible fundraising on noncommercial stations” and admonishing licensee that broadcast five sponsored announcements and a seventeen minute interview with the proprietor of a for-profit company during which the station announcer solicited investment to assist production of the company’s product. “In this regard, we note the fact that the licensee did not receive consideration from broadcasting these fundraising pleas is not relevant to the question of whether the fundraising appeal was appropriate. Solicitations of the type conducted here are prohibited”. *Id.* at par. 6. See also, *In the Matter of Southern Rhode Island Public Radio Broadcasting, Inc., supra* (finding prohibited underwriting announcements contained clearly promotional references including price information, product or service comparisons and qualitative descriptions, and emphasizing the licensee’s failure to take corrective measures); *Windows to the World Communications Inc., DA 97-2535, 18 FCC Rcd 20239 (MMB, rel. December 3, 1997)* (finding numerous announcements identifying favorable qualities in the underwriter’s products as promotional in nature and constituting prohibited advertisements).

3. In the declaration of General Manager Berthold Reimers is the statement, para 6, that “The pledge amount associated with a given premium is set at an amount that exceeds WBAI’s cost for that premium, often at multiple of find to ten times the cost.” This statement raises more questions than it answers. The fulfillment costs are essentially bookkeeping, receiving pledged amounts and sending them along to the advertiser. The host who is shilling for the product during the half hour either would be unpaid, or if paid would be accounting for another stream of income from the commercial. The declarant does not state what portion of the pledge goes to the

The Opposition appears to say that the station has found an ingenious loophole. Because the commercialized pledge drives are not underwriting, nor do they consist of underwriting announcements, they do not trigger the underwriting rules and warrant no further inquiry. We believe the Opposition is grievously mistaken. The pledge drives that we see here, reduced to a grotesque barker channel for drug peddlers and other purveyors of for-profit product lines, unless curtailed, are a direct threat to the core noncommercial service of public radio.

D. LOOKING AT THE SPECIFICS OF WBAI'S PLEDGE DRIVES

Significantly, Pacifica's Opposition ignores Petitioner's argument that WBAI hosts such as Gary Null, Eric Corley and Christine Blodale personally benefit from the promotion and sale of their own products and services during incessant pledge drives.

1. Gary Null Fundraisers

The Opposition is mostly silent as to the Gary Null products and services sold over its airwaves. Instead, Pacifica contends that its programmers are entitled to hawk their own products because "[p]ledge drive on-air talent are either paid a flat appearance fee (just like any other paid on-air talent) or receive no compensation at all." Opposition at p. 6. What remains unmentioned in the Opposition is the that *Gary Null is the host of each of the programs in which Gary Null products are sold*. Indeed, the shows featuring Gary Null products that Petitioner cited in the Petition are entitled "*The Gary Null Show!*"

The one notable instance where Pacifica addresses program host Gary Null's sale of his products and services over WBAI's airwaves is footnote 24 of the Opposition at page 6. Here, Pacifica attempts to minimize its unlawful payment arrangement with Gary Null by claiming the retreat was two years ago and they "do not anticipate offering it again anytime in the future." This argument is feeble at best, as the Commission looks at performance (and rule and policy violations) over the entire span of the eight-year renewal period. Ultimately, a violation is a violation, regardless of when it occurred, provided it was after the renewal granted in 2013.

2. Eric Corley Hacker's Conference

Even more egregious is Pacifica's failure to address Petitioner's allegations regarding violations of the Communications Act and FCC rules by program host Eric Corley. The event

Station, in effect as its sales commission. That the revenue may be as much as ten times the station's cost only implies that this is a highly lucrative design for the advertiser.

offered by Eric Corley occurred as recently as earlier this year. Pacifica's failure to respond to allegations showing the solicitation of other for-profit events by program hosts using the same "donation" method is telling, and ultimately suggests that Pacifica has become indifferent to the legality of its ongoing commercial solicitations.

3 Christine Blodale "End of Suffering" Products

Pacifica also fails to address the allegations regarding repeated solicitation of "End of Suffering" products by program host Christine Blodale on her show entitled *Christine Blodale Presents*. These products, which are created and sold by the program's co-host Brent Michael Phillips, are repeatedly described on air in a manner that blatantly violates Commission rules regarding product identification and underwriting. See e.g., *In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, Public Notice, 7 FCC Rcd 827 (1986) ("We reiterate that acknowledgements should be made for identification purposes only and should not promote the contributor's products, services, or company."). Here too Pacifica fails to articulate how the programming identified by Petitioner constitutes anything other than blatant advertising for commercial products sponsored by the program's hosts.

E. FCC DONOR LISTS

Pacifica claims that "WBAI does not have any donors who provide dedicated funding to support specific programs[.]" In that way they claim to be exempt from the requirement that funders whose contributions support specific programs must be listed in the on-line public information file. See 47 C.F.R. § 73.3527(e)(9) (requiring lists of donors supporting specific programs to be identified in a Station's public inspection files for two years). This claimed exemption stems from the conclusory assertion that the Station does not accept paid programming or underwriting. The argument fails for the same reason that WBAI's program length advertisements are not exempt from the ban on commercialization. Because Pacifica's programmers and hosts manufacture, distribute and directly advertise their own products over WBAI's airwaves, their broadcasts are the functional equivalent of paid programming. The transcripts and audio programs submitted by Petitioner evidence that the products and conferences are hawked over the airwaves, a single program stuffed with references to the host's websites where they are separately available for purchase, and with calls to action to purchase

each of those items, including reference to retail price for those products and seminars. Rather than addressing this issue, Pacifica offers only vague assertions that “the station may have more pledge programming” than other non-commercial radio stations, along with the admission that WBAI “does not anticipate offering [Gary Null retreats] again anytime in the future.”

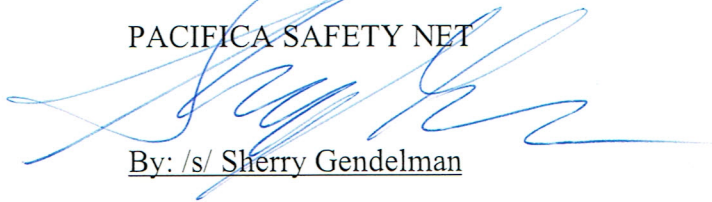
(Opposition at p. 6, fn. 24)

III. CONCLUSION

In its Opposition, Pacifica had the opportunity to admit that the instances documented in in more than 200 pages of our transcripts and other exhibits have shown a gross commercialization and misuse of the air by a noncommercial educational licensee. Pacifica could have forthrightly stated that the Station and the licensee regret these errors, and that if a license renewal is granted, station policies will be developed to assure that nothing like this ever happens again in the next renewal term. Unfortunately, this was not the approach adopted in the Opposition. Instead, Pacifica resolutely and categorically denied (with a single possible exception) that any of these program practices violate the Communication Act or the rules and policies of the Federal Communications Commission. That defiant approach leaves the Agency with no alternative. Issues must be added to determine whether this licensee has repeatedly violated a whole array of rules applicable to noncommercial educational stations, and in the totality of its behavior during renewal term, whether or not it has shown itself to be able to be trusted with a Federal licensee in the public interest.

Respectfully submitted,

PACIFICA SAFETY NET



By: /s/ Sherry Gendelman

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June 18, 2022

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Reply in Support of Petition to Deny the application for renewal of Station WBAI was sent by electronic mail and First Class Mail, postage fully prepaid, on June 20,2022, to the following:

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Dated: June 20, 2022

By: /s/ Richard Tam

**EXHIBITS FOR REPLY
IN SUPPORT OF PETITION TO DENY
FILED BY PACIFICA SAFETY NET**

APPLICATION FILE #0000180618

FACILITY ID #51249

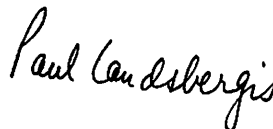
DECLARATION

I, Paul Landsbergis, declare as follows:

1. This declaration is submitted in support of the Petition to Deny the renewal application of WBAI *FM), File No. 0000180618, Facility ID 51249.
2. I am a member of Pacifica Safety Net, and reside at 20 Plaza St. East, Apt. E21, Brooklyn, NY 11238.
3. I also reside within the service area of radio station WBAI and have regularly listened to WBAI and other local over-the-air radio stations for many years.
4. I have reviewed the factual assertions contained in the Declaration of Sherry Gendelman in support of the Petition to Deny concerning my residence address and membership in Pacifica Safety Net, and I declare that they are true to the best of my knowledge.

I hereby state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 9, 2022



Paul Landsbergis

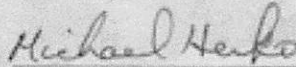
DECLARATION

I, Michael Herko, declare as follows:

1. This declaration is submitted in support of the Petition to Deny the renewal application of WBAI (FM), File No. 0000180618, Facility ID 51249.
2. I am a member of Pacifica Safety Net, and reside at 75 Henry Street, Brooklyn, NY 11201.
3. I also reside within the service area of radio station WBAI, and have regularly listened to WBAI other local over-the-air radio stations for many years.
4. I have reviewed the factual assertions contained in the Declaration of Sherry Gendelman in support of the Petition to Deny concerning my residence address and membership in Pacifica Safety Net, and I declare that they are true to the best of my knowledge.

I hereby state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 11, 2022


Michael Herko

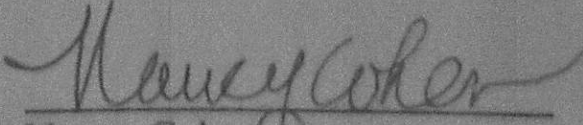
DECLARATION

I, Nancy Cohen, declare as follows:

1. This declaration is submitted in support of the Petition to Deny the renewal application of WBAI (FM), File No. 0000180618, Facility ID 51249.
2. I am a member of Pacifica Safety Net, and reside at 435 East Ninth Street, 4F, New York, NY 10009.
3. I also reside within the service area of radio station WBAI, and have regularly listened to WBAI and other local over-the-air radio stations for many years.
4. I have reviewed the factual assertions contained in the Declaration of Sherry Gendelman in support of the Petition to Deny concerning my residence address and membership in Pacifica Safety Net, and I declare that they are true to the best of my knowledge.

I hereby state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 15 2022



Nancy Cohen