Agreement, Licensee And Public Interest Groups
Reimbursement Agreement

Petitions filed by citizens groups for approval of the reimbursement provisions in six licensee-citizens group settlement agreements, granted. Reimbursement provisions will be approved only if the expenses claimed were incurred in the representation of the citizens groups before the Commission and are documented.

FCC 78-875

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Petitions for Special Relief of Citizens Communications Center Requesting Express Commission Approval of Reimbursement Provisions Contained in Licensee-Citizens Group Agreements in Certain Cases.

MEMORANDUM OPINION AND ORDER

(Adopted: December 21, 1978; Released: January 2, 1979

BY THE COMMISSION: COMMISSIONERS LEE AND WASHBURN CONCURRING IN THE RESULT; COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT; COMMISSIONER BROWN ISSUING A SEPARATE STATEMENT.

1. On April 12, 1978, and June 15, 1978, Citizens Communications Center (Citizens), a public interest law firm, filed petitions for special relief requesting the Commission to expressly approve the reimbursement provisions contained in the licensee-citizens group agreements in the following cases: *Starr WQIV, Inc.*, 59 FCC 2d 257 (1976) (hereafter *WNCN*): *Washington Star Communications, Inc.*, 61 FCC 2d 223 (1976) (hereafter *WMAL*); *New South Radio, Inc.*, DN 20463 (1977) (hereafter, *WACT*); *WGAL Television, Inc.*, DN 21034, (1977) (hereafter *WGAL*); *Flower City Television Corp.*, FN BTC-8341, (1977) (hereafter *WOKR*); *Newhouse Broadcasting Co.*, FN BTC-8372 (1977) (hereafter *KOIN*). Since Citizens is classified as a tax-exempt charitable and educational organization pursuant to Section 501(c)(3) of the Internal Revenue Code, it is subject to IRS guidelines regarding acceptance of fees for legal services rendered. On March 8, 1978, the IRS ruled that Citizens may not accept reimbursement of its legitimate and prudent expenses which a licensee has agreed to pay without

jeopardizing its tax-exempt status unless the Commission expressly approves the reimbursement. Media Access Project (MAP) has filed comments in support of Citizens' petitions for special relief. No opposition to the petitions has been filed.

2. In each of the above cases, Citizens represented community groups objecting to the Commission's grant of pending renewal and/or assignment applications.[1] The agreements reached between the citizens groups and licensees included provisions for improved broadcaster performance in areas such as ascertainment of community problems, minority employment and local programming. As part of the overall agreement between the licensee and community group, each licensee agreed to reimburse the legitimate and prudent expenses incurred by the challenging community group, and, in fact, the licensees already have paid the agreed upon amounts to Citizens, which has placed the funds in escrow.[2] In each case the Commission granted the application subsequent to the filing of the licensee-citizens' agreement with the Commission,[3] doing so only after finding that "the public interest, convenience, and necessity would be served" by the granting of each application.[4]

3. The Commission, while granting the applications, did not expressly "approve" the licensee-citizens group agreements. Instead, citing its *Statement of Policy re: Agreements Between Broadcast Licensees and the Public*, 57 FCC 2d 42 (1975), the Commission neither approved nor disapproved the terms of the agreements, in whole or in part. In the *Statement of Policy*, the Commission determined that it would not prescribe nor prohibit particular terms of licensee-citizens

[1] The Civil Liberties Union of Alabama in the *WACT* case; Feminists for Media Rights in the *WGAL* case; Action for Better Media and Rochester Black Media Coalition in the *WOKR* case; National Organization for Women, Portland, Oregon Chapter, in the *KOIN* case; D.C. Media Task Force and Adams-Morgan Organization in the *WMAL* case; and WNCN Listeners Guild of N.Y. in the *WNCN* case.

[2] The amounts paid to Citizens pursuant to the terms of the reimbursement provisions and placed in escrow are $5,200 (the *WACT* case), $36,057.50 (the *WGAL* case), $1,975 (the *WOKR* case), $10,390 (the *KOIN* case), $50,000 (the *WNCN* case), and $15,000 (the *WMAL* case). Citizens' petitions contain affidavits and accompanying itemized statements which detail the hours spent by each attorney and paralegal and the hourly rate charged for each person's time, along with a detailed accounting of out-of-pocket expenses, for each case except the *WACT* case. There apparently is no affidavit submitted in connection with the *WACT* case, although Citizens has submitted an itemized statement detailing the time expended and out-of-pocket expenses.

[3] The *WACT* case, Summary Decision of Administrative Law Judge Byron E. Harrison, Docket No. 20463, File No. BR-3690 (November 11, 1977); the *WGAL* case, Summary Decision of Administrative Law Judge Reuben Lozner, Docket No. 21034, File No. BRCT-50 (August 18, 1977); the *WOKR* case, Consent to Transfer Control—Form 732, File No. BTC-8341 (August 15, 1977); the *KOIN* case, Consent to Transfer Control—Form 732, File No. BTC-8372 (August 26, 1977); the *WMAL* case, 51 FCC 2d 223 (July 30, 1976); and the *WNCN* case, 59 FCC 2d 257 (May 5, 1976).

[4] 47 U.S.C. Sec. 309(a). This provision mandates such a public interest finding by the Commission before an application is granted.

group agreements, as long as the terms are not unlawful or violative of particular Commission rules.[5]

4. Subsequent to the grant of the licensees' applications by the Commission, Citizens requested a ruling from the IRS that acceptance of the funds paid by the licensees to reimburse its legitimate and prudent expenses incurred in connection with the application proceedings would not jeopardize its Section 501(c)(3) tax-exempt status, since the FCC had "accepted" the agreements.[6] On March 8, 1978, the IRS ruled that Citizens could not accept the funds paid by the licensees pursuant to the reimbursement provisions of the settlement agreements since the Commission did not "approve" the reimbursement provisions.[7] Since the fees had not been "approved by an administrative agency" as required by Rev. Rul. 75–76, acceptance of the fees by Citizens would jeopardize its tax-exempt status.[8]

5. As a result of the IRS ruling, Citizens has filed these two petitions requesting our approval of the reimbursement provisions contained in the citizens' agreements in these cases.[9] We believe the public interest would be served best by granting Citizens' petitions and expressly approving the fees paid pursuant to the reimbursement provisions in the subject agreements.

6. In a recent decision, *Zenith Radio Corp.*, 42 RR 2d 468, 471 (February 17, 1978), the Commission, while expressly disapproving one aspect of a licensee-citizens group agreement,[10] held that the reimbursement provision was "compatible with Commission objectives." The Commission, citing the decision of the Court of Appeals in *Office of Communication of United Church of Christ* v. *FCC*, 465 F.2d 519 (D.C. Cir. 1972), stated that "the provision for reimbursement of Citizens Committee's expenses is not contrary to Commission policy, as it appears that such reimbursement is limited to legitimate and

[5] The Commission stated that it would review agreements "to determine whether they improperly delegate nondelegable licensee responsibilities, whether they improperly bind future exercise of the licensee's non-delegable discretion, and whether they otherwise comply with applicable statutes, rules, and policies." 57 FCC 2d at 54.

[6] Citizens informed the Commission in a letter dated June 4, 1976, that it intended to request a ruling from the IRS concerning the sufficiency of the Commission's action in "accepting" the agreements and that it might become necessary to return to the Commission at a later date depending upon the outcome of the IRS ruling.

[7] Letter from Jeanne S. Gessay, Chief, Ruling Section, Exempt Organizations, Technical Branch, IRS, to Citizens Communications Center, dated March 8, 1978.

[8] *Id.*

[9] As pointed out above, the licensees already have paid Citizens the amounts stated in the settlement agreements, and the funds have been deposited by Citizens in an escrow account. Therefore, Commission approval of the reimbursement provisions will in no way require the reopening of existing agreements, or require the Commission to reconsider whether the granting of the applications was in the public interest.

[10] The Commission disapproved the provision of the agreement which required the licensee to go silent for six hours preceding a format change since this provision improperly curtailed the future exercise of the licensee's nondelegable discretion.

prudent expenses incurred by the Committee as a party to this proceeding." Moreover, in examining the agreements before us in the renewal proceedings, we determined that they "otherwise comply with applicable statutes, rules and policies" (note 5, *supra*). Both Citizens and the licensees in question determined that the reimbursed fees were reasonable and prudent. In the 1975 *Statement of Policy* licensees were instructed to reject proposals they feel are not in the public interest (57 FCC 2d 48 at para. 21) and we have stated that "[w]herever possible, we will construe the provisions of citizen agreements in a manner favorable to their implementation." 57 FCC 2d 49 at para. 25. Obviously, in light of IRS policy, Commission refusal to give express approval to the reimbursement provisions before us constitutes *de facto* disapproval since Citizens may not accept the funds payable under these provisions. This is a frustration of our policy, and we therefore expressly approve the reimbursement provisions of the licensee-citizen agreements listed in paragraph 1, *supra*, and the fees paid thereunder.

7. Accordingly, for the foregoing reasons, IT IS ORDERED, that the Petitions for Special Relief filed by Citizens Communications Center in the cases herein ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

CONCURRING STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

RE: PETITIONS FOR SPECIAL RELIEF FILED BY CITIZENS COMMUNICATIONS CENTER REQUESTING APPROVAL OF REIMBURSEMENT PROVISIONS CONTAINED IN CERTAIN LICENSEE-CITIZENS GROUP AGREEMENTS.

I reluctantly concurred because (1) I believe the entire subject of legal reimbursement raises serious questions that should be resolved by comprehensive rulemaking not by an ad hoc special exception; (2) the intrusion of the FCC into this particular agreement violates the spirit and intent of our 1975 policy statement stating the FCC would maintain neutrality and neither prescribe nor prohibit any particular agreement terms; and (3) I question the propriety and legality of reimbursing legal expenses for longtime adversary activist groups who do not represent the overall public but use legal processes to promulgate their own private, self-serving version of public interest.

I am particularly concerned about Commission sanction of private agreements and reimbursements because the overall real public is usually unaware of the agreement provisions which significantly affect what it sees and hears on television and radio. I remain concerned that a single, highly vocal group, with an indeterminate constituency can exert disproportionate influence over programming for the entire community.

The preferences of one group might well be antithetical to a far greater majority of others. If many minority, civic or citizens groups

all prevailed upon a station for special agreements, (with the added inducement of reimbursement for litigation), the resulting chaos could threaten the quality and stability of broadcast service.

Public interest law firms enjoy tax exempt status under Section 501(c)(3). The IRS has ruled that ". . .public interest law firms are charities only so long as they provide representation in cases of important public interest that are not economically feasible for private firms." Revenue Rule 75–76 notes that ". . .the likelihood or certainty of an award of fees is a factor affecting the appropriateness of the particular litigation for a public interest law firm. . .As legal precedent is developed indicating the strong possibility of the recovery of fees, certain issues may become economically feasible for private litigants and thus inappropriate for public interest law firm participation."

I would, again, like to make the point that "public interest law firms" is often a misnomer. These firms represent private groups who often seek special treatment and consideration for their own viewpoints at the overall public's expense. It is questionable whether tax exemption is valid for some "public interest" groups that promote their own narrow, private version of public interests.

I will be watching with interest as further requests are made for express "approval" of reimbursement agreements. If such requests are granted in the future they will serve to further develop the precedent spoken of in Revenue Rule 75–76. Once it becomes obvious that a "likelihood or certainty of an award of fees" does, in fact, exist, then I would expect that the IRS will review the charitable status of the petitioners.

Therefore, I reluctantly concur in this result.

SEPARATE STATEMENT OF COMMISSIONER TYRONE BROWN

RE: PETITIONS FOR SPECIAL RELIEF OF CITIZENS COMMUNICATIONS CENTER REQUESTING EXPRESS COMMISSION APPROVAL OF REIMBURSEMENT PROVISIONS CONTAINED IN LICENSEE-CITIZENS GROUP AGREEMENTS IN CERTAIN CASES

The Commission's decision today to approve the reimbursement provisions contained in these licensee-citizens group agreements is long overdue. There is no compelling reason in law or policy to deny explicit approval to these agreements.

It should be emphasized that no substantive Commission policy is affected by today's action. The substance of licensee-citizen group agreements will still be a matter for the parties to negotiate and the Commission will continue to review such agreements to assure that they do not delegate nondelegable licensee responsibilities nor otherwise contravene applicable statutes, rules or policies.

In the past, we have "accepted" or "not accepted" these agreements. As Commissioner Hooks said in a case wherein the Commission

determined that it would not "object" to a withdrawal agreement after reviewing its terms:

> "Although the Commission may be chary of putting its express imprimatur on this agreement and emits a flutter of disinterested ambiguities, its actions speak louder than its words. . . . The agreement herein is *de facto* and *de jure* approved. Anyone doubting that result is wearing blinkers." *Star WQIV, Inc.*, 59 FCC 2d 257, 261 (1976) (dissenting).

The failure to explicitly approve reimbursement provisions has adversely affected only two public interest communications law firms which are exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. Through the semantic adjustment we make today, with respect to these cases, these firms will be permitted to be reimbursed for their expenses under these particular agreements without jeopardizing their tax-exempt status.

The refusal to expressly "approve" the reimbursement agreements in these cases could only have been motivated by two factors. The first is disapproval of the activities of these public interest firms in representing views and groups which traditionally have gone unrepresented in Commission deliberations. The Commission has never claimed this as the basis for indirectly inhibiting participation by public interest law firms, and I doubt that a majority of Commissioners, at least in recent years, would have been willing to go on record as subscribing to that view.

The second—and more generous—reason for not technically "approving" these agreements in appropriate circumstances is that requiring the Commission to examine and approve reimbursement provisions will place a substantial burden on the Commission's processes. The short answer to this contention is that such agreements are not numerous enough to cause concern about burdening our processes and, moreover, failure to grant approval may prolong challenges which themselves place burdens on our staff.

And, of course, we already have a mechanism for approval of similar reimbursement provisions in cases where an applicant for a construction permit drops out of a comparative proceeding for a new facility and is permitted to be reimbursed for its "expenses" by the remaining applicant. Those decisions, though mandated by statute, 47 U.S.C. § 311(c), require the Commission to get even further involved in reviewing the judgments of the parties since the agreements are often accompanied by lucrative "consultancy" agreements for the applicant which bows out of the competition. We analyze such provisions to make certain that they are not disguised "pay offs" for dismissing a competing application. This procedure certainly can be modified to deal with the simpler issues raised by reimbursement agreements in the petition-to-deny context.

Thus, a desire to limit the burdens on our processes does not stand in the way of approving these agreements. There are substantial public policy arguments in favor of our approving these agreements. While I

applaud the belated action we take today in these particular cases, I hope that we may soon revisit the general question of "approving" such agreements in name as well as in fact.