

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)	

PETITION TO DENY

PACIFICA SAFETY NET

Pacifica Safety Net
P.O. Box 8336
Berkeley, CA 94707

info@pacificasafetynet.org

(415) 859-0323

May 2, 2022

* * *

TABLE OF CONTENTS

I	INTRODUCTION	4
II.	BACKGROUND TO PARTIES.....	4
	A. LICENSEE: PACIFICA FOUNDATION INC.....	4
	B. RADIO STATION: WBAI (FM)	6
	C. PETITIONER: PACIFICA SAFETY NET	6
III.	STANDING OF PETITIONER	6
IV.	SPECIFIC ALLEGATIONS OF FACT	7
	A. WBAI ROUTINELY AIRS PROMOTIONAL ADVERTISING IN ITS UNDERWRITING ANNOUCEMENTS.....	7
	B. WBAI IS IN VIOLATION OF COMMISSION RULES REQUIRING THE PUBLIC DISCLOSURE OF DONORS SUPPORTING SPECIFIC PROGRAMS	13
	C. PACIFICA'S BOARD OF DIRECTORS AND ITS TOP MANAGEMENT, HAVING RECEIVED NUMEROUS WARNINGS ABOUT WBAI'S DISREGARD OF THE LAW, FCC RULES AND POLICIES, HAS ABDICATED THEIR DUTY OF OVERSIGHT AND CONTROL OF THE LICENSEE	14
V.	LEGAL ARGUMENT.....	15
	A. LAWS, RULES AND POLICIES REGARDING SPONSORSHIP IDENTIFICATION AND UNDERWRITER ANNOUNCEMENTS BY NCE STATIONS	17
	B. COMMISSION CASE LAW CONFIRMS THE GRAVITY OF THE VIOLATIONS ITEMIZED ABOVE	19
VI.	CONCLUSION.....	21

SUMMARY

Petition to Deny Renewal Application of WBAI

File No. 0000180618

Throughout the recent eight year license period of WBAI-FM, (99.5 MHz, New York, NY) the station has engaged in a number of what we believe to be ongoing FCC violations involving: self-inurement, underwriting, public file omissions, sponsorship ID regulations, and potential pay for play or plugola. These are detailed in the attached petition to deny submitted by Pacifica Safety Net, a 501(c)(3) “friends of” Organization that includes listeners and donors to both WBAI-FM and the other four Pacifica foundation NCE stations, and whose members include New York WBAI listeners residing in the station’s service area.

Attached to the Petition are representative audio and written transcripts documenting the problematic programming that has been repeatedly broadcast over the WBAI airwaves during the current license period. These transcripts include highlighted time annotations of what we believe to be the content in violation of FCC regulations. We have intentionally limited the samples to approximately 20 hours of content, though we have collected substantially more examples which we are willing to provide at the Commission’s request.

Based on the unlawful acts set forth in the petition, Petitioners set forth several potential remedies detailing what we hope can be done to address the ongoing compliance issues at WBAI through detailed actions by the Commission.

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)	

PETITION TO DENY

Pacifica Safety Net (“PSN” or “Petitioner”), a 501(c)(3) media foundation of concerned listeners and donors to WBAI and to other Pacifica Foundation licensed radio stations, hereby petitions to deny the application for renewal of license of WBAI submitted on January 21, 2022, by Pacifica Foundation.

I. INTRODUCTION

WBAI (FM) is a noncommercial educational broadcast station (NCE), licensed by the Federal Communications Commission (FCC), to and operated by the Pacifica Foundation, Inc., a California non-profit corporation. Throughout most of the pending renewal term the station has engaged in conduct not consistent with Federal Law and FCC rules, regulations and policies governing the use of air time by noncommercial, educational entities. Taken as a whole, these deficiencies reflect a wholesale default of oversight and control by national and local management.

The violations we allege include specific instances of failure with respect to Commission rules and policies concerning payola, pay-for-play regulations, sponsorship identification requirements, on-air underwriting rules, personal inurement restrictions, material omission of required public file submissions, and lack of licensee oversight and control.

II BACKGROUND TO THE PARTIES

A. LICENSEE: PACIFICA FOUNDATION, INC.

The license holder, Pacifica Foundation Inc., is a 501(c)(3) donor-funded California not-for-profit corporation with assets valued at over \$120 million. It is the oldest independent non-commercial media network in the United States. Pacifica owns and manages five noncommercial

FM radio stations in five of the top ten media markets, with signals potentially reaching over 60 million listeners: KPFA in the San Francisco Bay area (founded in 1949); KPFK in Los Angeles (1959); WBAI in New York City (1960); KPFT in Houston (1970); and WPFW in Washington, D.C. (1977). Pacifica is currently supported by under 40,000 donors; 65% of whom are residents of California.

Pacifica's KPFA was the first listener supported broadcast station in the United States, since 1949 pioneering the concept of member support that is the cornerstone of U.S. public broadcasting today. The organization's main contribution to U.S. journalism has been the consistent airing of alternative perspectives on American and global politics, and the celebration of cultural, ethnic, musical and artistic diversity.

B. RADIO STATION: WBAI (FM)

WBAI-FM serves the greater New York metropolitan area. It was purchased by philanthropist Louis Schweitze in the 1950's. Mr. Schweitze donated it to the Pacifica Foundation in 1960. Throughout the 1960's and early 70's WBAI played a major role in the evolution and development of the counterculture, including anti-Vietnam war activists and live protests, gay rights activists, women's rights, and anti-nuclear programming. WBAI also was instrumental in introducing iconic artists to the world: Bob Dylan, Janis Ian, John Corigliano, Philip Glass, and John Cage, to name just a few.

WBAI is licensed and operated as an NCE but its channel is not reserved and it is located in the non-reserved band. It would have high value in a sale, lease or time brokerage to a commercial licensee or user. Despite having the best signal coverage of any of New York's public radio stations WBAI's listenership has deteriorated to become one of the least-heard stations in the Metropolitan area. It averages between .01 and .02 percent, that is one 10th of 1% of radio listeners in the New York market.

C. PETITIONER: PACIFICA SAFETY NET

Petitioner PSN is an independent 501(c)(3) media foundation of concerned listeners and donors to Pacifica Foundations and its licensed radio stations. PSN is a not-for-profit organization led by current and former Pacifica Foundation board of directors, donors, and listeners and dedicated to raising money, outside the purview of Pacifica Foundation management, to protect the

local stations from the immediate dangers they face. PSN's mission is to keep the Pacifica stations and their unique program service on the air so they may continue to elevate the discourse on controversial public issues, promote diversity, and respect the health and safety of listeners throughout the United States. PSN is funded by donations and by volunteer support.

III. STANDING OF PETITIONER

PSN has standing under Section 309(d) of the Communications Act, 47 U.S.C. Sec. 309(d) to submit this Petition to Deny. As stated, PSN is a California-based 501(c)(3) non-profit corporation. It operates the website www.pacificasafetynet.org.

Attached as Exhibit #1 to the Declaration of Sherry Gendelman ("Gendelman Decl.") is the PSN mission statement. Exhibit #2 to her declaration is a select list of PSN members with their residential addresses in the New York City listening area, to establish direct status as interested parties.

For both these reasons, as well as being donors to the Pacifica Foundation, Petitioner has standing to file this Petition, 47 U.S.C. Section 309(d); *Office of Communication of the United Church of Christ v FCC*, 359 F.2d 994 (D.C. Cir. 1966) ("UCC v. FCC"); See also Section 73.3584 of the Rules and Regulations, 47 C.F.R. Sec. 73.3584.

III. SPECIFIC ALLEGATIONS OF FACT

A. WBAI ROUTINELY AIRS PROMOTIONAL ADVERTISING IN ITS UNDERWRITING ANNOUNCEMENTS

WBAI has willfully and repeatedly broadcast paid programming without identifying the sponsor of such programming. Examples abound. For instance, in a clear appearance of corruption and pay-for-play, a self-injuring WBAI Producer named Gary Null generates income by hawking his company's for-profit products and services on WBAI's airwaves. As set forth more fully in the attachments to the accompanying Declaration of Sherry Gendelman, regular programs devoted exclusively to promoting WBAI host Gary Null's "nutritional supplements" are repeatedly pitched over the airwaves as part of a "pay to play" operation involving WBAI management. Relevant examples include the following:¹

1. As set forth in the accompanying Declaration of Sherry Gendelman, Petitioner has obtained recordings of numerous programs broadcast on WBAI, including those featuring the hosts Gary Null, Christine Blodale and Eric Corley. Although Petitioner is unable to submit the audio recordings through LMS as part of the Petition, Petitioner is submitting copies of these audio recordings as attachments to the Petition mailed to the Chief of the Audio Division, the Chief of the Enforcement Bureau, and legal counsel for WBAI/Pacifica. Copies of these audio recordings

1. Recording of WBAI broadcast: Gary Null Special concerning his "Nitric Cell Stuff" nutritional supplements, recorded on January 16, 2021 (See Gendelman Decl., Exh. 3).

Co-Host Linda Perry (WBAI Program Director) (Commencing at 32:50): "5166203602 is the number to call to get nitric cell stuff. Gary Null's new stuff. Just not even out on the market only for WBAI listeners nitric cell stuff for \$90 pledge to WBAI. And to help this listener sponsored station, call in the phones are open now. 516 620 3602, 516 620 3602 to join the call calling right now and ask for this nitric cell stuff"

Co-Host Linda Perry (52:42): "Gary Null is speaking about the importance of nitric oxide and he has created a powder which will increase blood flow it will help you to make yourself healthier to make yourself more active to even what was that it would increase your bone mass. It's one of the things that can do that. increase circulation nitric cell stuff \$90 for the nitric cell stuff a new product from Gary no 516 620 3602 helps improve blood pressure." *Id.*

2. WBAI broadcast recording of Gary Null Special concerning his "Sleep Stuff" nutritional supplements, recorded on or about February 10, 2020 (Gendelman Decl., at Exh. 4)

Co-Host Linda Perry (48:06): "Oh, well. Oh, well. So this is listener sponsored WBAI in New York. We're talking with Dr. Gary Null. And we have some offers for you to become a member of WBAI. We're running out of time \$99 a pledge of \$99 will give you Gary Null's sleep stuff. Just a scoop of it into some liquid that you prefer will help you destress and fall asleep. And also the DVD de stress naturally that we've been talking about 516 620 3602 is the number to call \$99 pledge just say that you want Gary Null's sleep stuff and the DVD that we're throwing in de stress naturally 516-620-3602 Can we see some calls coming in right now join the caller who's calling and asking for Gary Null's sleep stuff. And the destress naturally DVD 516 620 3602 is the number to call. You can also go to our website, give to wbai.org and grab the thank you gift there. Gary Null's sleep stuff and de stress naturally a DVD that we've been talking about a film, one of Gary Null's films that he's produced about what causes stress and how to alleviate stress, which we've been talking about. And the sleep stuff. Tell us a little more about what's in that sleep stuff Gary 516-620-3602 is the number \$99 we'll get you Gary Null's sleep stuff and the DVD de stress naturally Gary Null's film.

Co-Host Linda Perry (52:27): "So Gary. Gary knows sleep stuff plus the de stress naturally DVD the film all for you for \$99 as a contribution to 100% listener sponsored WBAI in New York. Please call us now. 516 620 3602 ask for a Gary Null's sleep stuff. We could call it Gary Null's calm stuff. Destress but ask for Gary Null's sleep stuff. Gary, Null's sleep stuff and destress naturally, the DVD for a \$99 contribution to WBAI in New York. All the money goes to WBAI to running this radio station so that it can continue to bring you the information that you like to listen to the conversations you want to hear and the different insights into areas that maybe you didn't know about before, but you know now because you're listening to WBAI 516 620 3602 ask for Gary Null's sleep stuff, and the destress naturally DVD and become a member of WBAI. By doing that if you're a Gary Null listener and you appreciate Gary Null and the knowledge that he brings to his products in the knowledge and experience and the research then ask for the Gary Null's sleep stuff and the de stress naturally film or just ask for the Gary Null's sleep stuff. And we'll we're throwing in the film. That is for a \$99 contribution to WBAI we also are available for download via the URL identified in the accompanying Gendelman Declaration.

have very little time left 516 620 3602. That's the number to call to become a listener sponsor \$99 for the Gary Null's sleep stuff, and they destress naturally film 516 620 3602 join the people who are calling now and join WBAI. 516 620 3602. or go to our website. Give to WBAI.org. And, Gary, I want to thank you for being so generous with your time and your knowledge and your expertise. You are just fabulous.”

3. WBAI broadcast recording of Gary Null Special concerning his “Triple Stuff Pack” nutritional supplements, recorded on December 28, 2019 (Gendelman Decl., Exh. 5)

Gary Null (01:31): “Our scientists are now reviewing the blood workup. And they'll tell me yes or no. We created a whole new scientific paradigm. Or we just got people healthier. One or the other.”

Gary Null (02:30): “We increased bone mass 2.3 to 3%. In, in all the people and the highest bone mass increase was the woman who had also processed who was 94.”

Linda Perry (09:01): “Gary has a treat for everyone. What we're offering today a special three things, the red stuff, green stuff, and also the muscle stuff. And we're offering the three together as a pack for listeners sponsor WBAI for listeners to call in and to become members of WBAI by calling 516-620-3602 for a pledge of \$160 you get a thank you gift of the muscle stuff, the green stuff and the red stuff. So can you tell listeners a bit about what this is?”

Gary Null (09:35): “I invented green stuff for myself and my mother 30 years ago. In fact, it was 33 years ago, I was going on tour and I knew that where I was there was not going to be any healthy food I could eat. I was going out to Cheyenne, Wyoming. Nice people not a good diet and big on beef and potatoes and white bread. So anyhow, what I did is I had a garden down at my organic farm. And it was about five acres, and I just harvest everything and Houston. And a friend of mine, a friend of mine then said, let's try this without heat. I said, Okay, so that's what we did, we dried all these vegetables. And so when I, when I was out on the road, I found that I could take a scoop of this throughout the day, and I just felt so much energy you couldn't imagine.

That was terrific. And when I got back, about a month and a half later, I'm in the Institute of fire biology in my lab and I felt something I sitting at my desk, and I'm rubbing my forehead, and I suddenly felt somehow when I looked in the mirror, and suddenly, where I have male pattern baldness, all the men in my family do. Suddenly there, I saw little hair growing. Whoa, you know, I had done everything I could to get my hair grow, and nothing was causing growth. And so I thought, well, how did this happen, and the only thing I could imagine that time was different in my life was the that powder that I made, but I had to redo the whole thing all over again, because I didn't keep track of what was growing in the garden. And so I grew everything again. And again, I tried it. And this time, I asked some of my friends who had thinning hair to try it. And they tried it and it worked.

And then I did the largest study I've ever done. For 1500 people 5000 showed up, it took a year to see could we reverse male and female pattern baldness, and a group of people who stuck to a very specific protocol, and it worked. So that was the first thing but then my mom, no matter how many times I would say, look, please just stop with all the bad food that you're eating, you smoke three packs of cigarettes a day, you're drinking coffee all day. And you know, you're eating this same old food, and it's not healthy. And she's Well, she's you know, but I'm used to it. And you know, and I'm old. And as a mom, you're 50 years old, you're not old. She said, well, I feel

old. So I said, if we just do this, we just try this. Okay, she wouldn't change anything else. So I gave her a bottle of this huge bottle. And then I just kept sending her models of it. And it made a difference, she felt substantially better.”

Co-Host Linda Perry (21:00): “Okay, so what we're offering is Gary Nulls triple Stuff Pack. It's the green stuff, the red stuff and the muscle stuff for a contribution to WBAI of \$160. If you would get these separately, they'd be that cost you a lot more. It's the Gary Nulls triple Stuff Pack that you asked for when you call 516 620 3602. Or you can go to our website, give to wbai.org. And if you just put in Gary Null, you'll see it comes up triples Stuff Pack for a contribution of \$160 to listener sponsor WBAI in New York.”

Although the above products are couched as “premiums” offered in exchange for donations to WBAI, substantial evidence indicates that Gary Null retains much of the proceeds from products and services offered on his shows. For instance, a WBAI Treasurer’s Report dated May 9, 2017 states:

“The local Finance Committee was told by WBAI General Manager Berthold Reimers that a retreat has been offered by Gary Null as a premium; the payment for the retreat is \$2,500, and that payment is being sent to Mr. Null, after which Mr. Null pays WBAI \$500, the other \$2,000 goes to pay for the actual retreat. Committee members raised questions about the legality of this way of handling the payment. They believe that the money must legally go to WBAI as the charity to which the payment is being made, and that WBAI should then pay Mr. Null the \$2,000. There is also a question regarding the issue of the tax deduction credit which the listener should receive. If the \$2,500 payment for the premium is paid to Mr. Null and he gives the \$500 to WBAI is Mr. Null getting the tax deduction or is the listener who’s actually paying for the premium getting the tax deduction?”

See Gendelman Decl., Exh. 18 (highlighted text)

Similarly, a WBAI Treasurer’s Report dated February 10, 2016 states:

"The General Manager told the local Finance Committee that a recent Gary Null retreat that was a fund raiser for WBAI had grossed about \$200,000 but that WBAI’s net from that event was only about \$6,000. Committee members were concerned about WBAI only getting what amounted to 3% of the overall gross as a contribution after having contributed on-air publicity for this event. There were questions regarding the conformity of this arrangement to the charity laws of New York".

See Gendelman Decl., Exh. 7 (highlighted text).² See also Gendelman Decl., Exhibit 8 (WBAI Profit and Loss Statement for the period July-August 2019, with pink highlighted text documenting income and third party payments with respect to “Premiums – Gary Null”.

Transactional program producers with prohibited financial products involving compensation from multilevel marketing schemes now are a constant on WBAI. Numerous examples are noted in the exhibits attached to this petition. Besides the egregious Gary Null “infomercials” noted above, WBAI’s Christine Blodale Presents series of fundraising specials include numerous beauty products, “how to” programs, alternative healing and other services. One example is a special program on WBAI promoting Christine Blodale’s “The End of Suffering” Products, broadcast on or about April 23, 2020 (Gendelman Decl., Exh. 14). Relevant portions include the following:

Co-Host Brent Michael Phillips (Time Code 35:56): We have been programmed by our ancestors, especially our parents to suffer and worry to live in anxiety and fear. Hmm. And so there's when we have all these codes inside of us that are attracting that. And so it's really wonderful. I have this patent pending technology, that you just listen to it with headphones, and it will then train you into a what's called a theta brain state.

Christine Blodale (38:42): All included in this program. That's right. The End of Suffering. And this is available. This is a what I love about this too is we don't we don't have to send anything out. We don't people don't have to wait for you know, for anything to be delivered. This is something that all we need is and Folks, we just need your email address. And we will be sending you this as a as a special link. Yes, access to this program. And this is this is currently I know this is available on your website, you have this on your website.

Brent Michael Phillips (39:16): Yes I do. Anyone that wants to pay the full price, you can hop over to my website at www.awakeningdynamics.com, and it's listed there for \$397.

Christine Blodale (39:18): So it's close to \$400 on your website, and you can go I've checked before the show I did. But we're offering it and wonderful Brent Michael Phillips is offering this technology for you and the world for a donation to this radio station because he's just a very extremely generous human being with his life and his talent. And he's offering it to free \$150 donation to this radio station. So I think it's an incredible offer for our listeners. It's an incredible journey and powerful, powerful I don't want to it's not medicine, but it feels like it is. It is something that is so, so powerful can apply to every aspect of somebody's life.

2. See also Gendelman Decl., Exh. 11 (Email from Neal S. Greenfield, Esq., General Counsel of Gary Null & Associates, Inc. to WBAI staffer Berthold Reimers dated August 5, 2019 alleging fraud by WBAI in connection with offering Gary Null “Curing the Incurable” cookbooks as premiums for pledges despite the lack of any existing copies).

Additional transcripts of Christine Blodale infomercials are set forth in the Gendelman Decl. at Exhibit 15 and Exhibit 16. Petitioners further submit on information and belief that Ms. Blodale receives a bonus on per unit sales of on-air product where she has acted in the capacity of publicist for the product producer.

Violations of self-inurement and nondisclosure of underwriting regulations at WBAI are not just restricted to snake oil or alternative beauty product sales. A long running hacking program called OFF THE HOOK PROGRAM has run unabashed promotions for attendance to their for-profit, bi-annual Hackers Conference, (The HOPE Conference or Hackers On Planet Earth).³ Significantly, the show's host Eric Corley (aka Emanuel Goldstein) owns the conference through his online magazine 2600.com, a publication he owns and promotes shamelessly on his WBAI radio show. *e.g.*, Gendelman Decl., Exh. 17 (Eric Corley hosted "Off The Hook" program dated April 6, 2022, commencing at Time Code 35:26)

"And as is our tradition, in April, when there's a Hope conference coming up later in the year, we give 10% of all Hope ticket sales for the month of April to EFF as a donation. So we encourage people who have not yet decided to come to Hope or who just want to buy a ticket and support the conference and EFF go to hope.net all the details are there. Hope, of course, hackers on planet Earth, that's our bi annual, bi annual one, that means every two years. We have that conference every two years. And it's it's an amazing gathering place for people from all over. I think we're going to have all kinds of interesting presentations, displays on what's going on in Russia, the whole Ukrainian situation and just ways from a hacker perspective that we can address world situations like this, as well as the talks about the Coronavirus, and just the hacker culture in general, there's still time to submit talk proposals or workshop proposals or seminars or all kinds of different things.

Again, all the details are on hope.net. It's at St. John's University. First time we've been there that, as I mentioned, tearing down the hotel Pennsylvania. But so many things have changed since the last time we got together in 2018. So I really hope that we see a lot of people this summer because we're recovering from the last two years of hell, we're dealing with a world that's that's tearing itself apart. And we're trying to build something positive and different. We want to hear from you. So hope.net support EFF comes to the conference, and learn what the real hacker world is all about."

³ Pulitzer Prize-winning business reporter, Michael Hiltzik from The Los Angeles Times, did an investigative story on this type of transactional programming on WBAI sister station, Pacifica's KPPK Los Angeles station. WBAI shares some of its pre-recorded fundraising programming with KPFK LA. *See* M. Hiltzik, "Column: The Crisis at Iconic Public Radio Station KPFK Gets Deeper," [Los Angeles Times](https://www.latimes.com/business/story/2020-02-07/crisis-at-pacifica-kpfk), Feb. 7, 2020 (available at <https://www.latimes.com/business/story/2020-02-07/crisis-at-pacifica-kpfk>).

See also Gendelman Decls., Exh. 20 and Exh. 21 for additional highlighted examples from the WBAI program “Off the Hook” promoting the HOPE Hacker Conference.

The above transcript excerpts demonstrate that the required line between noncommercial and commercial activity is routinely obliterated at WBAI. Review of WBAI transcripts cited in this Petition reveal programming to constitute little more than commercial cable TV infomercials for the premium items provided by the program’s hosts. Rather than occasional pledge breaks during routine programming, these infomercials hawking products and services sponsored by WBAI hosts constitute *the entire subject matter of programming*. These shows “flip the script” of traditional NCE fundraising. Rather than a few short pledge breaks to explain the station’s premiums and invite listener pledges, WBAI instead broadcasts an ongoing stream pledge breaks, with only short breaks for program content.

More troubling is the fact that program hosts act on-air as if they are employed by the company providing premiums rather than being a staff member at the radio station. Excessive time and repetition is spent complimenting and praising the services and products being “sold” and the guests from those companies. As so little actual program content is provided, the entire program constitutes little more than a commercial for the premium provider rather than a special fundraising effort by the radio station.

In addition, there is currently an ongoing U.S. Department of Labor Investigation (DOL Case Number: 9-3290-20-480) into WBAI’s alleged practice of ignoring IRS regulations. In further support hereof we are attaching a Memorandum from the WBAI Treasurer, R. Paul Martin dated June 14, 2017, as the entire document is vitally important in showing conflict of interest violations. See Gendelman Decl., Exh. 6.

B. WBAI IS IN VIOLATION OF COMMISSION RULES REQUIRING THE PUBLIC DISCLOSURE OF DONORS SUPPORTING SPECIFIC PROGRAMS

Besides the above violations, WBAI’s has willfully and repeatedly violated Commission rules regarding the on-line public inspection file, and in particular the rule requiring that a licensee upload and retain donor lists with regard to sponsored programming for two years. Section 73.3527(e)(9) of the Rules provides that a station’s public inspection file include the following:

(9) Donor lists. The lists of donors supporting specific programs. These lists shall be retained for two years from the date of the broadcast of the specific program supported.

Here, there is no indication that WBAI has ever disclosed in its public inspection file lists of donors who support specific programs broadcast on that station. The station's failure to identify the donors promoting specific programs is particularly troubling, when the programs, as discussed above, are little more than promotional advertising.

NCE stations that previously run afoul of these same rules have been sanctioned by the Commission when these violations have been discovered during the renewal process. In one notable example a Notice of Apparent Liability for Forfeiture was issued against Minority Television Project ("MTP"), with an initial penalty of \$14,000 assessed based on the licensee's failure to properly maintain donor and public interest programming lists in the station's public file. *See In the Matter of Minority Television Project*, DA-17 345A1 (2017). In that matter, MTP discovered after filing its renewal application that it had failed to timely place in its electronic public interest file copies of donor lists for the entire license term, as well as failure to upload tv issues/programs lists for from first quarter 2007 through first quarter 2016. These violations resulted in a total forfeiture of \$20,000. *Id.* WBAI's similar and multiple failures here need to be explored through evidentiary hearing.

C. PACIFICA'S BOARD OF DIRECTORS AND ITS TOP MANAGEMENT, HAVING RECEIVED NUMEROUS WARNINGS ABOUT WBAI'S DISREGARD OF THE LAW, FCC RULES AND POLICIES, HAS ABDICATED THEIR DUTY OF OVERSIGHT AND CONTROL OF THE LICENSEE

Given the above facts (numerous other egregious program transcripts exist), it is clear that WBAI Management turns a blind eye to these deceptive and unlawful practices despite numerous complaints from senior staff, listeners, donors and organizations such as CPB and health advocacy groups. WBAI management has received on numerous occasions notice of various and significant violations. See Gendelman Decl., Exhibits 9, 10, 11 and 19.

On information and belief, Petitioner submits that this behavior has been facilitated and encouraged over the last eight years due to contributions by dark-money, 501(c)(4) organizations (including Social Uplift, in California and Alliance for Community Elections (A.C.E.) in New York) which are partially funded by WBAI producers and for-profit business programmers. These organizations then recruit and fund Pacifica board election candidates aligned with their interests. Upon their election, these directors then support the continued broadcast of WBAI programming in

violation of the rules cited herein. In recent testimony under oath, the director of the 501(c)(4), Social Uplift, admitted to taking money for election support from Producer Gary Null's business associate for Pacifica election purposes. Mr. Null's business partner, Steve Brown, is the also director of A.C.E. See Gendelman Decl., Exh. 22).

The consistent lack of an appropriate legal compliance culture and safeguards to ensure that rules are followed are a direct result of tampering by the Board of Directors in the professional broadcast management of WBAI. Numerous executive directors of the foundation, CFOs, independent auditors, station managers, legal counsel and consultants have confirmed this mismanagement at WBAI. However, given the facts submitted herein, it is evident that WBAI and Pacifica have completely abdicated their oversight responsibilities. *See e.g., Trustees of the University of Pennsylvania (WXPN(FM))*, 69 F.C.C. 2d 1394, 44 R.R.2d 747 (1978).

◇. **LEGAL ARGUMENT**

A. LAWS RULES AND POLICIES REGARDING SPONSORSHIP IDENTIFICATION AND UNDERWRITER ANNOUNCEMENTS BY NCE STATIONS

1. Section 317 and Commission Rules Regarding Payola and Plugola

Section 317 of the Communications Act of 1934, as amended, 47 U.S.C. § 317, requires that broadcasters disclose to their listeners whether any matter has been aired in exchange for money, services or other valuable consideration. Section 317(a)(1) of the Act provides in part that:

All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person....

The Commission has adopted rules at 47 C.F.R. § 73.1212 that expressly detail a broadcaster's responsibility to provide such proper sponsorship identification:

When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce: (1) That such matter is

sponsored, paid for, or furnished, either in whole or in part, and (2) By whom or on whose behalf such consideration was supplied....

In enforcing these rules, the Commission has repeatedly cited the underlying policy that “listeners and viewers are entitled to know who seeks to persuade them.” See *Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators*, Public Notice, 20 FCC Rcd 8593, 8593–94 (2005).

As well the policy behind these disclosures is to provide listeners and viewers with information concerning the sources of broadcast information, to avoid their being misled or deceived. See e.g., *Sonshine Family Television, Inc.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 18686, 18694, para. 15 (2007), *aff’d with reduced forfeiture*, Forfeiture Order, 24 FCC Rcd 14830, 14834, para. 12 (2009) (forfeiture reduced, based on licensee’s history of compliance).

2. Prohibition of Commercial Announcements on Public Broadcasting Facilities

The Communication Act at § 399 (b)(2) expressly provides that:

No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

In addition, Sections 73.503(d) and 73.621(e) of the Commission’s Rules, and subsequent Orders implementing those Rules specifically prohibit the broadcast of announcements by public broadcast stations which promote the sale of goods and services of for-profit entities in return for consideration paid to the station. These rules do, however, permit contributors of funds to the station to receive on-air acknowledgements. The Commission has articulated specific guidelines which emphasize the difference between permissible donor and underwriter announcements and commercial advertising. See e.g., *Commission Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations*, 97 FCC 2d 255 (1984); *Commission Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations*, 90 FCC 2d 895 (1982); Second Report and Order, 86 FCC 2d 141 (1981); *First Report and Order and Notice of Proposed Rulemaking*, 69 FCC 2d 200 (1978).

3. Restrictions on the Content of Underwriting Announcements

As noted above, the Communication Act at § 399 (b)(2) and Commission Rules expressly prohibit public broadcast stations from broadcasting advertisements on behalf of individuals and entities. “Although an NCE licensee may broadcast underwriting announcements identifying entities that donate to the station by name, such announcements may not promote an entity’s businesses, products, or services. In addition, such announcements may not contain comparative or qualitative descriptions; price information (sales or discounts); calls to action; inducements to buy, sell, rent, or lease; or excessively detailed “menu listings” of services offered by the entity.” *In the Matter of Board of Trustees of the University of Arkansas*, Order, DA-20-12 (Jan. 7, 2020) (citations omitted) (Order adopting Consent Decree for violation of underwriting laws by licensee of NCE stations by broadcasting announcements that promoted the products, services or businesses of its financial contributors). See also *In the Matter of The Athenian Multicultural Study Club*, DA-21-31 (Jan. 19, 2021) (Order adopting Consent Decree based on LPFM licensee’s alleged violation of underwriting laws by broadcasting announcements on behalf of for-profit entities in exchange for consideration).

4 Disclosure of Donor Lists

Section 73.3527(e)(9) of the Commission’s Rules provides that a station’s on-line public inspection file include the following:

Donor lists. The lists of donors supporting specific programs. These lists shall be retained for two years from the date of the broadcast of the specific program supported.

Donors contributing to general station support need not be listed in the public file. But where a donation is specifically linked with a particular program, that donor in all cases must be listed in the on-line file.

5, Abdication of the Licensee's Obligation to Maintain Oversight and Control

Substantial evidence exists to show that the Board of Directors of Pacifica Foundation and its top management during the renewal term have been given repeated warnings that the misconduct at WBAI is inconsistent with the requirements of Law and of FCC rules and policies. Management at best has been willfully ignorant, or negligent. At

worst, there are instances where leadership has become complicit or even financially interested in the misconduct. In extreme cases such as this, a default of oversight and control has been determined to warrant outright license revocation, *Trustees of the University of Pennsylvania (WXPN(FM))*, 69 F.C.C. 2d 1394, 44 R.R.2d 747 (1978).

B. COMMISSION CASE LAW CONFIRMS THE GRAVITY OF THE VIOLATIONS ITEMIZED ABOVE

As noted above, Section 317 of the Communications Act and the Commission's Rules at §73.1212(a) prohibit the use of paid-for broadcast programming in the absence of required sponsorship identification. Thus, for instance, the Commission issued a Notice of Apparent Liability against Cumulus Radio, LLC and related entities based on their repeated failure to air sponsorship identifications with respect to paid-for broadcast programming. See *In The Matter of Cumulus Radio LLC, et al.*, 34 FCC Rcd 7289 (2019). In that matter, the Commission found that the Cumulus entities failed to air required sponsorship announcements in connection with certain paid programming, which resulted in a consent decree requiring the adoption of a compliance plan, the filing of regular compliance reports, and prompt notification to the Commission of any noncompliance. Subsequent to the consent decree, the Cumulus entities received payment to broadcast sponsored programming, and broadcast that programming at seven stations on 26 separate occasions without airing appropriate sponsorship identification announcements or providing required notification to the Commission. By imposing a \$233,000 penalty on those stations for repeated violation of Section 317 of the Act and Section 73.1212(a) of the Rules, the Commission noted that

Our action today advances the Commission's longstanding goals of protecting consumers by ensuring that they know who is attempting to persuade them, and by protecting broadcasters and sponsors from unfair competitors that fail to abide by our disclosure rules. When a broadcast licensee fails to disclose the sponsor of paid programming, it might mislead the public into believing that the paid broadcast material is a station's independently-generated news or editorial content. In addition, enforcement of the sponsorship identification requirements protects competition by preventing sponsors from gaining an unfair advantage by paying stations to present commercial material as news or editorial content, while their competitors' paid programming is properly disclosed as sponsored material. [Id. at para. 3 (citations omitted)].

Similarly, in 2017 the Commission issued a Notice of Apparent Liability for Forfeiture (NAL) against Sinclair Broadcast Group, Inc. and its subsidiaries in the amount of \$13,376,200 based on its repeated violations of § 317 of the Communications Act and §73.1212(a) of the Commission’s Rules requiring sponsorship identification announcements. See *In the Matter of Sinclair Broadcast Group, Inc.*, 32 FCC Rcd 10853 (2017) (“*Sinclair*”). In *Sinclair*, that licensee was found to have improperly broadcast sponsored programming pursuant to its agreement with the Huntsman Foundation (HCF) concerning about the Huntsman Cancer Institute without proper sponsorship identification. The agreement between Sinclair and HCF provided for the broadcast of “compensated stories as news content,” including paid programming in the form of news segments that aired during local news. This content included 1,366 on-air news stories and long-form programs broadcast on Sinclair stations without any identification, and 71 long form programs broadcast by Sinclair that identified the programming as paid but failed to clearly identify the sponsors. In addition, Sinclair was found to have provided the paid programming to thirteen (13) non-Sinclair stations more than 280 times without advising those licensees that the programming was sponsored or who sponsored it. Those non-Sinclair stations were then found to have broadcast those programs without informing viewers that the programming was paid for by a third party or clearly identifying the third party.⁴

Numerous other examples also exist. For instance, in 2014 the Commission previously issued a Forfeiture Order in against Radio License Holding XI, LLC based on that licensee’s willful and repeated violation of Section 317(a)(1) of the Act and Section 73.1212(a) of the Rules due to its failure to air required sponsorship identification announcements. See *In the Matter of Radio License Holding XI, LLC*, 29 FCC Rcd 1623 (2014). In that instance, the station aired programming on behalf of an organization called Workers Independent News (WIN) without adequate disclosure that this was advertising, rather than a news story. Following a letter of inquiry, it was discovered that the licensee had failed to adequately provided sponsorship identification announcements for eleven (11) 90-second spots provided by WIN, in willful violation of the Act and Commission

4. In the NOI, the Commission expressly rejected Sinclair’s arguments that the paid programming served the public interest and was similar to other programming regarding the Huntsman Cancer Institute which was previously aired without prior payment. *Id.* at para.

Rules. In affirming its \$44,000 penalty, the Forfeiture Order affirmed that the station's 11 violations of Section 317(a)(1) of the Act and Section 73.1212(a) of the Commission's Rules were willful pursuant to 47 U.S.C. § 312(f)(1) and repeated. See also *In the Matter of Radio License Holding CBC, LLC*, 31 FCC Rcd 3 (2016) (Order regarding Consent Decree with Cumulus subsidiaries based on violation of sponsorship identification rules due to broadcast of announcements supporting a hydro-electronic project in New Hampshire without disclosing the identity of the company sponsoring those announcements).

VI LEGAL STANDARD FOR REVIEWING A PETITION TO DENY

As provided in 47 U.S.C. Section 309(d)(1),⁵ “Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies. . . . The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection . . . (k) in the case of renewal of any broadcast station license[.]”

As explained in case law, *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (“*Astroline*”):

The Commission must perform section 309(d)'s threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits. Moreover, in evaluating a request for an evidentiary hearing under *section 309(d)(1)*, the Commission must proceed ‘on the assumption that the specific facts set forth [in the petition] are true.’ *Citizens for Jazz on WRVR v. FCC*, 249 U.S. App. D.C. 342, 775 F.2d 392, 397 (D.C. Cir. 1985) [citing *Gencom, Inc. v. FCC*, 265 U.S. App. D.C. 403, 832 F.2d 171 (D.C. Cir. 1987)].

5. See 47 U.S.C. Section 309(d)(1). (“Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing.... The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.”)

If the Commission determines that a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. Sec. 309(e), *Astroline, Id.*, See 47 U.S.C. Sec. 309(d)(2). The facts to be set forth above amply demonstrate that Petitioner has met its burden of establishing a *prima facie* case, showing why the application for renewal of license may not be granted without further inquiry.

VI. CONCLUSION

It is indeed sad to see that the medical quacks who now dominate WBAI find themselves working hand in hand with those wishing to diminish or disable Pacifica stations altogether. As the quacks come to dominate regular programming, and expand their on-air solicitation time, regular programming of merit is marginalized or lost. What is left magnifies the power of the hucksters, while draining program value of the station for the benefit of anyone else. The audience shrinks to a core of those seeking miracle cures, and even the most die-hard listeners of old, such as many of the foreign-born cab drivers, become disgusted and stop tuning in.

In this cycle of tragic decline, it becomes more and more difficult to see a “public service” or “public interest” dimension to the program service at all. Instead, the station has become a monument to the durability of quack medicine in radio. A straight line may be drawn from Dr. Brinkley's goat gland rejuvenation treatments of the 1920⁶ to Gary Null's quack cures for cancer today. These things will always have a ready audience, but the First Amendment has never been a bar to reasonably curtailing them to protect the public. There is still hope that redress may be found through Federal food and drug laws, or even in tort claims of fraud and misrepresentation. But the license renewal application of WBAI places this crisis pivotally before the Federal Communications Commission. In this case it will be up to the Agency to decide whether the integrity of the noncommercial, educational service can be maintained. The stakes here far surpass what happens to WBAI and will radiate across all of public radio and public television for years to come.

Petitioner has presented this information for two purposes: First, to enable the FCC to investigate the matter and, upon investigating, if serious violations of FCC rules and policies are

⁶ Gene Fowler and Bill Crawford, *Border Radio: Quacks, Yodelers, Pitchmen, Psychics, and Other Amazing Broadcasters of the American Airwaves* (Rev. ed., U of Chicago Press, 2002).

found, to impose appropriate sanctions. And second, to assure that the persons responsible for the misconduct are placed on notice, forced to conform their behavior to the law's requirements, and hopefully to be excluded by management from station participation in the future. The first order of business will be to designate the renewal application for hearing, to confirm all the facts presented in this petition in their broader context, and to adduce related documents and testimony that would show an even larger pattern than the one set forth here.

As long-time supporters of Pacifica and its five owned stations, we take no pleasure in this action, and most certainly we do not advocate that WBAI's renewal application be denied. Pacifica's storied history since 1949 speaks strongly in favor of the station being permitted to continue its service to the public, but with the errant actions and persons suitably sanctioned and removed. Once the Commission has been satisfied that these series allegations have merit, we recommend a choice among some or all of the following sanctions, less drastic than a revocation:

- Monetary forfeiture
- A short-term renewal, for example for a two-year term
- A consent decree, including assurances that the misconduct will not be repeated in the future, a truly independent compliance officer with authority be appointed, and a detailed compliance plan be submitted by the Foundation.

Respectfully submitted,

PACIFICA SAFETY NET

By: /s/s Sherry Gendelman

Pacifica Safety Net
P.O. Box 8226
Berkeley, CA 94707

info@pacificasafetynet.org

(415) 859-0323

May 2, 2022.

CERTIFICATE OF SERVICE

I, Richard Tam, certify that copies of the foregoing Petition to Deny the application for renewal of Station WBAI were sent by First Class Mail, postage fully prepaid, on May 2, 2022, to the following:

Melodie A. Virtue, Esq.*
Foster Garvey PC
1000 Potomac Street N.W., Suite 200
Washington, DC 20007

Albert Schuldiner, Chief*
Audio Division, Media Bureau
Federal Communications Commission
45 L. Street NE
Washington, DC 20554

Loyaan Egal, Acting Bureau Chief*
Enforcement Bureau
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Dated: May 2, 2022 By: /s/ Richard Tam

*Including attached packet of audio recording exhibits.