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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FCC Mail Room

In re Application of)	
)	File Nos.: BALH – 20180301AAT
EMMIS RADIO LICENSE, LLC,)	BALH – 20180301AAU
)	BALFT – 20180301AAV
Licensee,)	
)	Facility ID Nos.: 27022 KNOU
and)	73890 KFTK-FM
)	138424 K254CR
ENTERCOM LICENSE, LLC)	
)	
Assignee,)	
)	
for Consent to Assignment of Broadcast)	
Station Construction Permit or License)	

REPLY TO JOINT OPPOSITION TO PETITION FOR RECONSIDERATION

James Allman (hereinafter referred to as “Allman”), by and through undersigned counsel, pursuant to 47 C.F.R. § 1.106, hereby submits this reply to the Joint Opposition to Petition for Reconsideration (hereinafter referred to as “Joint Opposition”) filed on June 13, 2018 by Emmis Radio License, LLC (hereinafter referred to as “Licensee”), Emmis Radio, LLC (hereinafter referred to as “Emmis Radio”), Entercom License, LLC (hereinafter referred to as “Assignee”), and Entercom Missouri, LLC (hereinafter referred to as “Entercom Missouri”) (collectively referred to as “Applicants”).

1. Applicants initially challenge Allman’s standing to file his Petition for Reconsideration by suggesting that the pursuit of a private civil claim fails to convey standing. In support thereof, Applicants state that “long-standing Commission policy dictates that contractual disputes should be heard in the courts, and not adjudicated by the Commission.” Joint Opposition, p. 3.

2. Applicants misapprehend Allman’s claim. He does not seek to litigate his civil

claim in any Commission proceeding. Quite the contrary, he seeks to have his claim litigated in the appropriate forum; however, the Commission's grant of the application creates a presumption that Applicants' conduct was proper and such a presumption harms Allman's ability to fair and impartial adjudication of the state claims. In this regard, his injury is directly traceable to the Commission's action, *i.e.*, the grant of the Application. Further, rescission of the grant eliminates the presumption.

3. In addition, Applicants assume that the Application, the associated purchase and programming agreements, and related conduct constitutes "an otherwise acceptable transaction." *See* Joint Opposition, p. 4, fn. 8. As will be demonstrated, such is not the case.

4. Setting aside Applicants' attempt at beguilement, Allman does not assert that Applicants specifically violated the multiple ownership rule, that is to say, Section 73.3555(a)(1); rather, Allman asserts that Assignee, together with its affiliated company, Entercom Missouri (hereinafter referred to as "Entercom," collectively) exercised *de facto* control over station personnel as evidenced by his termination by Entercom without approval by Licensee, together with its affiliated company, Emmis Radio (hereinafter referred to as "Emmis," collectively).

5. Furthermore, even if Allman's termination by Entercom does not by itself demonstrate *de facto* control over the stations, as will be demonstrated *infra*, the Asset Purchase Agreement (hereinafter referred to as "Purchase Agreement") and Local Programming and Marketing Agreement (hereinafter referred to as "Programming Agreement") establish the unauthorized transfer of control to Entercom.

6. "The Commission has consistently held that a licensee's participation in an LMA [local marketing agreement], also known as a time brokerage agreement ("TBA"), does not, *per se*, constitute an unauthorized transfer of control or a violation of the Act or any Commission

rules or policies.”¹ “In determining whether an unauthorized transfer of control has occurred, the Commission looks to any acts or agreements vesting in a “new” entity the right to determine basic policies concerning the operation of the station.”²

7. “The Commission analyzes *de facto* control issues on a case-by-case basis.”³ “In making decisions regarding *de facto* control, the Commission looks at whether the entity in question makes policies and decisions concerning three main areas of station operation: programming, personnel and finances.”⁴ While licensees are permitted under Section 310(d) of the Act to delegate certain functions on a day-to-day basis, “*ultimate responsibility for essential stations matters, such as personnel, programming and finances, is nondelegable.*”⁵

8. Despite Applicants’ contention that Allman failed to allege sufficient specific allegations to support his claim, the following facts are uncontroverted:⁶

a. In conjunction with a Purchase Agreement for the relevant radio stations,

¹ See, e.g., *Southeast Alabama Broadcasters*, 27 FCC Rcd 13363, 13368 (2012) (citing *Solar Broadcasting Company, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 5467, 5486 (2002)).

² See, e.g., *KHNL/KGMB License Subsidiary, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 16087, 16092 (2011) (citing *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856 (1969), *aff’d sub nom, Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).

³ *Shareholders of Hispanic Broadcasting Corporation*, 18 FCC Rcd 18834, 18843 (2003).

⁴ *Malara Broadcast Group of Duluth Licensee, LLC*, 19 FCC Rcd 24070 (2004).

⁵ *Solar Broadcasting Company, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 5467 (2002) (emphasis added).

⁶ Applicants allege that Allman’s Petition for Reconsideration does not comply with Section 309(d) of the Communications Act because it fails to include an affidavit or declaration supporting the allegations of fact presented therein. Joint Opposition, pp. 5-6. However, many of the facts and allegations contained in his Petition can also found in his state court petition, which was made under oath and incorporated into the Petition. Regardless, attached hereto is an affidavit by Allman affirming that the facts contained herein, as well as in his Petition are true and correct to the best of his information, knowledge and belief.

Emmis and Entercom entered into a Programming Agreement, *i.e.*, local marketing agreement, with commencement of said agreement to occur at 12:01 a.m. Central Time on March 1, 2018. Petition, ¶¶ 26-27; Application, Exhibit 5; *see* Joint Opposition, p. 2.

- b. Applicants, and the Programming Agreement in particular, were subject to the Commission's rules and regulations, specifically, 47 C.F.R. § 73.3555(a)(1)(i) and Note 2(j). Petition, ¶¶ 13-15; Application, Exhibit 18.
- c. Section 73.3555 mandates that a licensee must “maintain[] ultimate control over the station facilities including, specifically, control over station finances, personnel, and programming” during and in relation to any time-brokerage or marketing agreement. *See* 47 C.F.R. § 73.3555, note 2(j)(3).
- d. Allman and Emmis Radio entered into an employment agreement beginning on August 1, 2017 and expiring on July 31, 2020. Petition, ¶¶ 15-16; *see* Joint Opposition, p. 2, fn.2.
- e. Allman worked at one of the stations – KFTK-FM – prior to, at the time of, and subsequent to the date of the commencement of the Programming Agreement, *i.e.*, March 1, 2018. Petition, ¶¶ 16, 20; Joint Opposition, p. 2.
- f. Entercom, by and through its employees, terminated Allman's employment on April 10, 2018. Petition, ¶ 18; Joint Opposition, p. 2.

9. The foregoing facts clearly, unequivocally, and sufficiently demonstrate that Emmis relinquished control of, and Entercom asserted dominion over, station personnel in violation of Section 73.3555. Indeed, it was Entercom, without input or approval from Emmis, who decided to and did in fact terminate Allman from his employment at KFTK-FM.

10. Applicants seek to minimize the foregoing facts by claiming, first, that Allman

was duly employed by Entercom, and, second, that Emmis' continued control was specifically set forth in the Application. Suffice it to say, Applicants' defenses are without merit. Joint Opposition, pp. 6-7.

11. First, Applicants assert that Allman was an employee of Entercom beginning at the commencement of the Programming Agreement and ending on the date of his termination. Joint Opposition, p. 6. Thus, according to Applicants, this detail makes his termination irrelevant to the issue of Emmis' retention of control. *Id.*, pp. 6-7.

12. As an initial matter, Applicants, in a footnote, claim that, beginning March 1, 2018, Entercom assumed Allman's employment agreement and, ultimately, his employment at KFTK-FM;⁷ however, Applicants utterly fail to provide proof to the Commission of such assumption. Moreover, the assumption of Allman's employment agreement by Entercom proves nothing because, as the licensee, it is Emmis that must maintain ultimate control over any station personnel.

13. Nevertheless, even assuming that Allman's employment contract with Emmis was validly assigned to Entercom, which Allman does not concede, Applicants' claim that his termination had no effect on Emmis' control is utterly absurd and would eviscerate Section 73.3555's "ultimate control" requirement in its entirety. To be sure, what Applicants ultimately argue is that an assignee can assume the employees of a station and terminate them from their employment without authorization or approval from the licensee. If such an assertion were true, a licensee would never have "ultimate control" over a station's personnel during the existence of a local marketing agreement. Rhetorically, what control would Emmis really have if Entercom had the right to and did terminate all station personnel?

⁷ Joint Opposition, p. 2, fn.2.

14. Second, Applicants assert that Emmis' continued control over station personnel was clarified in an April 19, 2018 amendment to the application. In that amendment, Applicants stated as follows:

In response to an inquiry from the FCC Staff, this Amendment serves to provide additional information regarding the Assignor's exercise of control over station personnel during the period that the local marketing agreement is in effect. In addition to other provisions that ensure the existing Licensee's ultimate control over the stations, Paragraph 14.1 of the APA and Paragraph 9 of the LMA provide that Assignor may retrain up to two employees during the pendency of the LMA, and Assignor has one so. The stations' Senior Vice President and General Manager has remained Assignor's employee, exercising control over the stations' programming, personnel, and finances. He will continue to do so until such time as the instant transaction is approved and consummated, and the LMA terminated. In addition, the stations' Director of Engineering served as a second Assignor-designated employee through April 2, 2018. As a practical matter, Assignor's finance director and human resources director, as well as one additional engineer, remained on Assignor's payroll and were working at the stations supervising various operations, personnel, and finance matters through March 31, 2018.

Application (April 19, 2018), Exhibit 1. *See also* Joint Opposition, p. 7, fn. 19.⁸

15. Applicants' assurances to the Commission ring hollow. Pursuant to Section 14.1 of the Purchase Agreement,

Sellers shall terminate at Commencement the employment of the Station Employees listed on Schedule 14.1 who are employed by Sellers as of Commencement, other than (a) any such listed employees on leave as of such date (unless, with respect to employees on leave, the Parties otherwise agree at Commencement) ("Employees on Leave") and (b) any such listed employees that are Contract Employees (as defined below) (such employees terminated by Sellers at Commencement, the "Transferred Employees"). In the case of Contract Employees Sellers shall terminate the employment, but not the applicable Assigned Employment Agreements, of said Contract Employees and such employment termination shall be deemed effective as of Buyers'

⁸ Applicants refer to the amendment as "Exhibit A to Amendment to Application." Joint Opposition, p. 7, fn. 19. To the extent that the foregoing quote substantially or materially differs from the language of the amended application, Allman states that he does not have a copy of or access to Exhibit A.

assumption of such Contract Employees' applicable Assigned Employment Agreements as set forth in Section 1.3(a) herein, which assignment and assumption the Parties intend to occur concurrently with Commencement. At the time of such assignment and assumption, such Contract Employees will become Transferred Employees effective as of Commencement.

Purchase Agreement, p. 36.

16. Pursuant to the Section 9 of the Programming Agreement,

The provisions in Article 14 of the Purchase Agreement with respect to employees and employee plans shall be applied to the Stations in connection with the implementation of this Agreement. Accordingly, as of Commencement the employees set forth in Section 14.1 of the Purchase Agreement shall become employees of Programmer as provided in the Purchase Agreement; provided, however, that if any Station employees described in Section 6 of this Agreement are deemed Transferred Employees, such individuals shall remain employees of Licensee until Closing.

Programming Agreement, pp. 3-4.

17. Taken together, the Purchase Agreement and Programming Agreement purport to transfer all employees not on leave from Emmis to Entercom thereby vesting Entercom with the right to terminate any such employee. *See* Joint Opposition, pp. 6-7 (alleging termination of employee does not affect Emmis' control of stations).⁹

18. By referencing the foregoing amendment, Applicants appear to further argue that Paragraph 14.1 of the Purchase Agreement and Paragraph 9 of the Programming Agreement demonstrate continued control by Emmis because those provisions authorize Emmis to employ two (2) employees during the pendency of the Programming Agreement.

19. Those provisions do no such thing; Paragraph 14.1 and Paragraph 9 make absolutely no reference whatsoever to Assignor's purported authority to retain up to two

⁹ *Cf. Malara Broadcast Group of Duluth Licensee, LLC*, 19 FCC Rcd 24070 (2004) (denying petition to deny application, in part, upon finding that putative licensee would have sole discretion to hire and fire employees).

employees during the pendency of the Programming Agreement. *See* Programming Agreement, pp. 3-4. While Paragraph 9 does reference Section 6 and Section 6 does authorize Emmis to employ a manager for the station, the extent of the authorization is for the employment of a single person. *Id.*, p. 2.

20. Similarly, in their assurance to the Commission, Applicants state that the Stations' Director of Engineering will serve as an Assignor-designated employee up through and including April 2, 2018 and further that Emmis' finance / human resource director, as well as one other engineer remained on Emmis' payroll and were working at the station supervising various operations, personnel, and finances up through and including March 31, 2018.

21. Unfortunately, none of these additional Assignor-designated employees, regardless of the veracity of their alleged supervisory roles, support Applicants in their claim that Emmis maintained ultimate control over station personnel since Allman was terminated after the above-referenced individuals left the station.

WHEREFORE, for the foregoing reasons, James Allman prays the Federal Communications Commission, or the designated authority, reject arguments asserted in the Joint Opposition to Petition for Reconsideration; grant the relief requested in the Petition for Reconsideration; and for such other and further relief as the Commission, or the designated authority, may deem just and proper in the premises.

Respectfully submitted,

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ss.

COMES NOW James J. Allman, being of lawful age and first duly sworn upon his oath, states that he is the Petitioner named in the above and foregoing Reply, that he has read same, and that the statements contained therein are true and correct to the best of his knowledge, information, and belief.

He further states that he has read the Petition for Reconsideration, and the statements contained therein are true and correct to the best of his knowledge, information, and belief.



James J. Allman, Affiant

Subscribed and sworn before me this 21st day of June, 2018

FRANK B. CURTIS
Notary Public - State of Missouri
My Commission Expires September 8, 2018
St. Louis County
Commission #14428915



Notary Public

(Notary Seal)

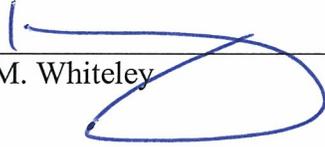
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Reply to Joint Opposition to Petition to Reconsideration was served upon the following individuals by depositing the same in the United States mail, postage prepaid, on the 21st day of June, 2018.

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