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

Accepted/Filed

APR 22 2014

FCC Office of the Secretary

In the Matter of
License Renewal Applications
of

Emmis Radio License, LLC

Station WFNI(AM)
Indianapolis, Indiana

Station WLHK(FM)
Shelbyville, Indiana

Station WYXB(FM)
Indianapolis, Indiana

Station WWVR(FM)
West Terre Haute, Indiana

Station WTHI-FM
Terre Haute, Indiana

and

Merlin Media License, LLC

Station WKQX(FM)
Chicago, Illinois

To: The Secretary
Attn: The Commission

File No. BR-20040401AOH
Facility ID No. 19521

File No. BR-20040401ARD
Facility ID No. 19522

File No. BR-20040401AOL
Facility ID No. 51432

File No. BR-20040401AJO
Facility ID No. 68824

File No. BR-20040401AJH
Facility ID No. 70652

File Nos. BR-20040802AQH,
BR-20120801AJU
Facility ID No. 19525

JOINT OPPOSITION TO PETITION FOR RECONSIDERATION

Emmis Radio License, LLC ("Emmis")¹ and Merlin Media License, LLC ("Merlin

¹ Emmis is the licensee of stations WFNI(AM), Indianapolis, Indiana, Facility ID No. 19521; WLHK(FM), Shelbyville, Indiana, Facility ID No. 19522; WYXB(FM), Indianapolis, Indiana, Facility ID No. 51432; WWVR(FM), West Terre Haute, Indiana, Facility ID No. 68824; and WTHI-FM, Terre Haute, Indiana, Facility ID No. 70652.

Media”),² hereby oppose the Petition for Reconsideration (“Petition”) filed by David E. Smith, Peter LaBarbera, Kathy Valente, the Illinois Family Institute, and the Illinois Chapter of the Concerned Women for America (collectively, “Petitioners”), in the above-captioned matter. Petitioners concede that the Petition is permissible only if it is based on new events or circumstances. Petitioners, however, have not shown that they could not have presented their “new” argument earlier. Moreover, in any case that argument and its factual predicate fall far short of warranting reconsideration.

The Petition is directed to a *Memorandum Opinion and Order* of the Commission *en banc* released March 7, 2014 (FCC 14-23), denying Applications for Review of decisions of the Media Bureau that granted the captioned license renewal applications. As Petitioners recognize, a petition for reconsideration of a decision denying an application for review may be filed only under very limited circumstances. Sections 1.106(b)(2) and (3) of the Commission’s Rules provide:

(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances are present:

- (i) The petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; or
- (ii) The petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity.

² Merlin Media is the licensee of station WKQX(FM), Chicago, Illinois, FCC Facility ID No. 19525.

(3) A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.³

Petitioners acknowledge these limitations, but contend that the Petition is permissible because it is based on enforcement actions by the Commission against religious broadcasters taken since the filing of the Applications for Review. Those actions, Petitioners appear to contend, evidence discrimination against Petitioners that amounts to a denial of “equal protection” under the Constitution.

Petitioners’ effort fails on several levels. First of all, Petitioners have not shown why they could not present their argument in their Applications for Review or in a supplement to those pleadings. To the extent the Petition contains additional “facts,” the “facts” fall into two categories: (1) that “Petitioners are Christian and seek to defend traditional Judeo-Christian morals and virtues,” and (2) that “during the period between November 27, 2010 and the date hereof [April 7, 2014], the FCC has conducted at least forty-one [41] separate investigations and/or forfeiture proceedings against Christian broadcasting organizations.”⁴

Presumably, Petitioners have been Christians seeking to defend the identified values since the outset of these proceedings, such that they could have presented this “fact” to the agency at an earlier stage. Certainly, Petitioners do not claim otherwise. Similarly, the investigations and proceedings against Christian broadcasters that Petitioners cite occurred – according to Petitioners’ own description – over approximately the last four years. Although Petitioners have never before presented these arguments, there is no reason why they could not have done so, as they depend on facts that existed before, or occurred during, the pendency of the

³ 47 C.F.R. § 1.106(b)(2)-(3).

⁴ Petition at 3.

Applications for Review. The Petition for Reconsideration therefore fails to satisfy the basic requirements of Section 1.106(b)(2) of the Commission's rules and is subject to dismissal under Section 1.106(b)(3) on this ground alone.⁵

Moreover, although Petitioners appear to argue that the Commission denied their objections to the subject renewal applications because they are Christians, the enforcement actions which they summarize in Exhibit A to the Petition are actions against *broadcasters*. If Petitioners wanted to attempt to show discrimination against them as complainants or objectors, they needed to demonstrate that the FCC has discriminated against *complainants* based on their religion. And in any case, as already noted, Petitioners have not previously identified themselves to the Commission as Christians, so it is difficult to see how the agency could possibly have discriminated against them based on their religion.

Further, insofar as Petitioners attempt to rely on enforcement actions against broadcasters, not only are those actions irrelevant to any claims of discrimination against Petitioners personally, but Petitioners clearly lack standing to raise such claims. As the Supreme Court has explained, there exists a "general prohibition on a litigant's raising another person's legal rights."⁶ A party may do so only when it can satisfy the following three-part test: (1) "[t]he litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently

⁵ 47 C.F.R. § 1.106(b)(3). In addition, in past stages of these proceedings, only Mr. Smith participated with respect to the captioned stations that are licensed to communities in Indiana. Mr. Smith is a resident of Illinois – not Indiana – and thus lacks standing to continue to challenge the Indiana stations' renewal grants. *See, e.g.,* Emmis Radio License LLC, Opposition to Application for Review at 8-12 (Mar. 4, 2009). The remaining petitioners have not attempted to – and cannot – establish that it was not possible for them to participate as to those stations until the filing of the Petition, as required by the FCC's rules. *Id.* § 1.106(b)(1). Further, with respect to WKQX(FM), Mr. LaBarbera and Ms. Valente were not parties to the Petition to Deny, but first sought to participate at the Application for Review stage, and similarly have never explained why it was not possible for them to participate sooner. *Id.*

⁶ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

concrete interest’ in the outcome of the issue in dispute,” (2) “the litigant must have a close relation to the third party,” and (3) “there must exist some hindrance to the third party’s ability to protect his or her own interests.” *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (quoting *Singleton v. Wulff*, 428 U.S. 106, 112–16 (1976)). Petitioners satisfy none of these elements with regard to their claim that the FCC has discriminated against Christian broadcasters.

Petitioners allege no specific harm flowing directly from the asserted differential treatment of Christian broadcasters. To the extent they might attempt to claim injury based on the Commission’s decision to enter into a consent decree with Emmis rather than taking other enforcement action, such a claim fails for all of the reasons Emmis has provided before, which the D.C. Circuit accepted.⁷ Nor do Petitioners even try to establish any relationship – let alone a “close relation” – between themselves and the Christian broadcasters they claim have suffered discrimination. And they do not, and could not, demonstrate the existence of any hindrance to such Christian broadcasters’ ability to protect their own interests before the FCC. Accordingly, Petitioners lack third-party standing to press claims on behalf of the broadcasters Petitioners identify as Christian.

Even assuming *arguendo* that a finding of FCC discrimination against religious broadcasters might support Petitioners’ claim that they have been denied equal protection,

⁷ Emmis has demonstrated on numerous prior occasions that Mr. Smith lacks standing to challenge the Indiana stations’ license renewal applications. *See, e.g.*, Emmis Radio License LLC, Opposition to Application for Review at 8-12 (Mar. 4, 2009); Emmis Radio License LLC, Opposition to Petition for Reconsideration at 4-6 (Oct. 18, 2007); Emmis Radio License Corporation Opposition to Informal Objection at 2 (filed Aug. 25, 2004). Emmis has similarly shown that the Petitioners lack standing to challenge the license renewal application of WKQX. *See, e.g.*, Emmis Radio License LLC, Opposition to Application for Review at 10-11 (Dec. 13, 2010); Emmis Radio License LLC, Opposition to Petition to Deny at 3-6 (Dec. 1, 2004). And the D.C. Circuit has held that “appellants lack[ed] standing to challenge . . . orders approving the consent decree.” *Smith v. FCC*, No. 06-1381, Order (D.C. Cir. Mar. 29, 2007) (copy attached as Exhibit A).

Petitioners have provided no basis for such a finding. All Petitioners have offered is a list they have apparently compiled of FCC enforcement actions since 2010 against broadcasters operating with religious formats. Though Petitioners apparently seek to contrast those actions with the Consent Decree that Emmis entered into with the Commission, the United States Court of Appeals upheld that decree as within the agency's discretion when it dismissed an appeal brought by some of the Petitioners.⁸ It is also worth noting that while Petitioners appear to claim that a consent decree evidences favoritism, one of the enforcement actions against religious broadcasters on which they rely was also a consent decree—and one which involved a monetary payment far below what Emmis paid.⁹

In order to demonstrate that the FCC discriminates impermissibly against religious broadcasters, Petitioners would have to show that the FCC practices both have a discriminatory effect and are motivated by a discriminatory purpose.¹⁰ A party seeking to override the “special province” of government regulators and bears a demanding burden, because “in the absence of clear evidence to the contrary, courts presume that” such regulators “have properly discharged

⁸ *Emmis Communications Corp.*, Order, 19 FCC Rcd 16003 (2004), *recon. denied*, Order on Reconsideration, 21 FCC Rcd 12219 (2006) (denying Petitioners' petition for reconsideration of the order approving the consent decree), *aff'd Smith v. FCC*, No. 06-1381, Order (D.C. Cir. Mar. 29, 2007). Mr. Smith, the Illinois Family Institute, and the Illinois Chapter of the Concerned Women for America participated in the appeal, along with individual Julie Cordry. Peter LaBarbera and Kathy Valente – both parties to the instant Petition – did not participate in the appeal. Regardless, the D.C. Circuit's ruling applies equally to Mr. LaBarbera and Ms. Valente, as they raise no individualized harms or arguments.

⁹ Petition at Exhibit A, ¶ 23.

¹⁰ *See, e.g., United States v. Armstrong*, 517 U.S. 456, 465 (1996). The same test applies to claims of selective prosecution for violations of criminal statutes and of selective enforcement of civil statutes or administrative requirements. *See Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000) (claim that IRS discriminatorily revoked a Church's tax-exempt status required the Church to show that “(1) [it] was singled out for prosecution among others similarly situated and (2) that [the] prosecution was improperly motivated, *i.e.*, based on race, religion, or another arbitrary classification.”).

their official duties.”¹¹ Petitioners’ bare list of enforcement actions against one sector of the broadcasting industry is not evidence of a discriminatory effect – let alone a discriminatory purpose – as the very cases Petitioners themselves cite make clear.¹² Moreover, Petitioners’ purported “evidence” is inconsistent with the reality that the Commission takes enforcement action against legions of broadcasters who do not transmit Christian formats.¹³

To the extent that Petitioners seek to “incorporate by reference all the legal arguments they have made in prior pleadings relative to the above-captioned applications,”¹⁴ such arguments are outside of the scope of a permissible Petition for Reconsideration of an order denying an Application for Review and the Commission need not address them.¹⁵ In any event, Emmis and Merlin have already rebutted each of these arguments and the Bureau and Commission have fully considered – and rejected – them, and Petitioners provide no basis for

¹¹ *Armstrong*, 517 U.S. at 464.

¹² In *United States v. Armstrong*, see Petition at 5, the Supreme Court explained that in order “[t]o establish a discriminatory effect” in an equal protection case, “the claimant must show that similarly situated individuals” who are not members of the allegedly protected class “were not prosecuted,” 517 U.S. at 465. The decision in *Yick Wo v. Hopkins*, 6 S. Ct. 1064 (1886), see Petition at 5, similarly supports this view, 6 S. Ct. at 1073.

¹³ See, e.g., <http://transition.fcc.gov/eb/broadcast/pif.html> (last visited Apr. 17, 2014) (listing selected enforcement actions related to public file violations, including many issued to broadcasters that do not transmit Christian formats); <http://transition.fcc.gov/eb/broadcast/eas.html> (last visited Apr. 17, 2014) (listing selected enforcement actions related to violations of the FCC’s emergency alert system rules, including many issued to broadcasters that do not transmit Christian formats); <http://transition.fcc.gov/eb/broadcast/asml.html> (last visited Apr. 17, 2014) (listing selected enforcement actions related to violations of the FCC’s antenna structure rules, including many issued to broadcasters that do not transmit Christian formats).

¹⁴ Petition at 4.

¹⁵ 47 C.F.R. § 1.106(b)(3).

disturbing these prior decisions.¹⁶ For example, Petitioners appear to repeat their claim that a lawsuit filed against Mr. Smith (but later dismissed with prejudice) by one of Emmis' former independent contractors constituted impermissible retaliation against Mr. Smith.¹⁷ This claim is one the Commission has previously rejected on numerous occasions, including in the order adopting the Consent Decree which was affirmed by the D.C. Circuit.¹⁸ Further, with respect to Petitioners' claim of "retaliation," it bears noting that the criminal statutes that Petitioners rely upon as a basis for this claim do not provide for a private right of action and are thus wholly irrelevant to the Commission's inquiry.¹⁹

¹⁶ Petitioners (and other parties represented by the same counsel) have repeatedly raised matters similar to those set forth in their prior pleadings, only to have their arguments properly rejected by the Bureau, the Commission, and the courts. *See, e.g., Emmis Communications Corporation*, Order on Reconsideration, 21 FCC Rcd 12219 (2006) (rejecting petition for reconsideration of order adopting consent decree and denial of indecency complaints related to station WKQX, which was then owned by Emmis), *petition for review denied*, *Smith v. FCC*, Order, No. 06-1381 (D.C. Cir. Mar. 29, 2007); Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to David Edward Smith and John E. Fiorini, III re FCC File Nos. BR-20040401AOH, BR-20040401AOH, BR-20040401ARD, BR-20040401AOL, BR-20040401AJO, BR-20040401AJH, DA 07-3836 (Sept. 5, 2007) (denying Informal Objection filed against Emmis' Indiana radio stations), *petition for reconsideration denied*, Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Dennis J. Kelly and John E. Fiorini, III re FCC File Nos. BR-20040401AOH, BR-20040401ARD, BR-20040401AOL, BR-20040401AJO, BR-20040401AJH (Jan. 19, 2009), *application for review denied*, *Emmis Radio License, LLC and Merlin Media License, LLC*, FCC 14-23 (rel. Mar. 7, 2014); Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Dennis J. Kelly and John E. Fiorini, III re FCC File No. BRH-200408021AQH (Oct. 22, 2010) (denying Petition to Deny filed against WKQX renewal application), *application for review denied*, *Emmis Radio License, LLC and Merlin Media License, LLC*, FCC 14-23 (rel. Mar. 7, 2014).

¹⁷ Petition at 3-4.

¹⁸ *See supra* note 16; *see also Smith v. FCC*, No. 06-1381, Order (D.C. Cir. Mar. 29, 2007).

¹⁹ *See Wileand v. Byrne*, 392 F. Supp. 2d 21, 22 (N.D. Ill. 1975) (no private right of action under 18 U.S.C. § 1505); *Shahin v. Darling*, 606 F. Supp. 2d 525, 539 (D. Del. 2009) (no private right of action under 18 U.S.C. § 1512).

Finally, with specific reference to WKQX(FM), it should be noted that the Commission on August 16, 2011, granted a “long-form” application for transfer of control of the station license which was not opposed by Petitioners (or anyone else). That transfer was consummated on September 1, 2011, and became “final” in ordinary course. Under established Commission policy, an entity seeking license renewal is not accountable for actions of a prior owner.²⁰ *A fortiori*, the agency’s approval of a new licensee should moot any possible cloud on the license attributable to alleged acts of a prior owner.

For the foregoing reasons, the Petition should be dismissed or denied.

²⁰ The instructions to the FCC Form 303-S renewal application confirm that actions of a previous owner are not relevant after the consummation of a long-form assignment or transfer application. FCC Form 303-S, Instruction I (“[I]f the station license was assigned or transferred during the subject license term pursuant to a ‘long-form’ application on FCC Form 314 or 315, the renewal applicant’s certifications should cover only the period during which the renewal applicant held the station’s license.”); *see also, e.g., Citadel Broadcasting Company*, 24 FCC Rcd 1653, 1654 (2009); *KROM(FM), San Antonio, Texas*, 22 FCC Rcd 556, 558 (2007).


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Dated: April 22, 2014

EXHIBIT A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1381

September Term, 2006

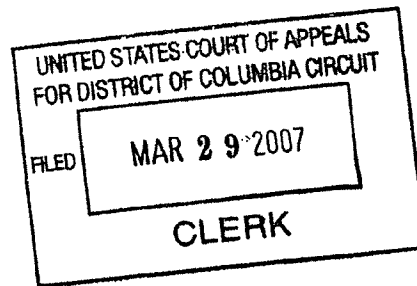
David Edward Smith, et al.,
Appellants

Filed On:

v.

Federal Communications Commission,
Appellee

Emmis Communications Corporation and Emmis
Radio License, LLC,
Intervenors



BEFORE: Randolph, Brown and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion to dismiss and to defer filing of record and briefing schedule, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. The decision of the Federal Communications Commission to enter into the consent decree is a nonreviewable exercise of agency discretion. See Heckler v. Chaney, 470 U.S. 821 (1985). Furthermore, the appellants lack standing to challenge the orders approving the consent decree. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Branton v. FCC, 993 F.2d 906, 909 (D.C. Cir. 1993). It is

FURTHER ORDERED that the motion to defer filing of record and briefing schedule be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:


Deputy Clerk/LD

CERTIFICATE OF SERVICE

I, Eve Klindera Reed, hereby certify that on April 22, 2014, I caused a copy of the foregoing **Joint Opposition to Petition for Reconsideration** to be mailed via first-class postage prepaid mail to the following:

Dennis J. Kelly
Post Office Box 41177
Washington, DC 20018

A handwritten signature in black ink, appearing to read "Eve Reed", written in a cursive style.

Eve Klindera Reed