



**Federal Communications Commission  
Washington, D.C. 20554**

**August 24, 2018**

*In Reply Refer to:*  
**1800B3-SS**

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In re: **KNOU(FM), St. Louis, MO**  
Facility ID No. 27022

**KFTK-FM, Florissant, MO**  
Facility ID No. 73890

**K254CR(FX), St. Louis, MO**  
Facility ID No. 138424

File No. BALH-20180301AAT  
File No. BALH-20180301AAU  
File No. BALFT-20180301AAV

**Applications for Assignment of  
License**

**Petition for Reconsideration**

Dear Counsel:

We have before us a May 30, 2018, Petition for Reconsideration (Petition) filed by James Allman (Allman) seeking reconsideration of the staff's April 27, 2018, grant of the referenced applications for consent

to assign (Applications) the licenses of Missouri Stations KNOU(FM), St. Louis; KFTK-FM, Florissant; and FM translator Station K254CR, St. Louis (Stations), from Emmis Radio License, LLC (Emmis), to Entercom License, LLC (Entercom) and related pleadings.<sup>1</sup> For the reasons set forth below, we dismiss the Petition.

**Background.** On February 22, 2018, Emmis and Entercom (collectively, the Parties) entered into an Asset Purchase Agreement (APA) whereby Emmis agreed to sell and convey to Entercom certain assets and properties, including the broadcast licenses of the Stations, for the sum of fifteen million dollars (\$15,000,000). Also, on February 22, 2018, the Parties entered into a Local Programming and Marketing Agreement (LMA) whereby under certain terms and conditions Entercom would provide programming to the Emmis Stations. Moreover, in accordance with the provisions of the APA, upon the March 1, 2018, commencement of the LMA, Entercom assumed from Emmis the future liabilities and obligations of the Stations' contract employees.<sup>2</sup> On March 1, 2018, the Parties filed the Applications proposing to assign the Station licenses to Entercom.<sup>3</sup>

On April 10, 2018, Allman, an "on-air" talent working under an "Employee Agreement"<sup>4</sup> at one of the Stations (KFTK-FM), was fired by Entercom. On April 27, 2018, Allman initiated legal action against the Parties in the Circuit Court of St. Louis County, Missouri, related to the termination of his employment.<sup>5</sup> Also on April 27, 2018, the staff granted the uncontested Applications.<sup>6</sup> On May 30, 2018, Allman timely filed the Petition.

In the Petition, Allman argues that, although he is not a party to this proceeding, he was "adversely affected" by the Commission's grant of the Applications<sup>7</sup> and that the Petition must be considered, because he had not heretofore had an opportunity to present facts and arguments in this matter to the Commission.<sup>8</sup> Substantively, Allman argues that his termination by Entercom violated Section 73.3555 of the Rules which states that every time-brokerage or marketing agreement "shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee [Emmis] . . . of the brokered station verifying that it maintains ultimate control over the station facilities including, specifically, control over station finances, personnel and programming . . . ."<sup>9</sup> Specifically, Allman

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<sup>1</sup> On June 13, 2018, Entercom and Emmis jointly filed an Opposition to the Petition (Opposition), to which Allman replied on June 22, 2018 (Reply).

<sup>2</sup> See LMA at para. 9 and APA at Section 14.1.

<sup>3</sup> See *Broadcast Applications*, Public Notice, Report No. 29186 (rel. Mar. 6, 2018). On April 19, 2018, the Parties, at the staff's request, amended the Applications to specifically set forth the details regarding Emmis's continued exercise of control over the Stations' personnel. See Applications, April 19, 2018, amendment, at Exh. 1.

<sup>4</sup> The term of the Employee Agreement is from August 1, 2017, until July 31, 2020. Petition at 5; see also Employee Agreement at para. 2.

<sup>5</sup> See *James Allman, Plaintiff, v. Emmis and Entercom, Defendants*, Circuit Court of St. Louis County, State of Missouri, Cause No. 18SL-CC01717, filed April 27, 2018.

<sup>6</sup> See *Broadcast Actions*, Public Notice, Report No. 49227 (rel. May 2, 2018). On April 30, 2018, the Parties consummated the transaction.

<sup>7</sup> Petition at 7.

<sup>8</sup> *Id.*, referencing 47 CFR § 1.106(b)(2). Allman also argues that consideration of his claims is in the public interest under Section 1.106(c) of the FCC's rules (Rules). Petition at 7.

<sup>9</sup> *Id.* at 4; see also 47 CFR § 73.3555 Note 2.

argues that his termination by Entercom is evidence that Emmis permitted Entercom to exercise unlawful power and control over the Stations in violation of Section 73.3555 of the Rules.<sup>10</sup>

In their Opposition, the Parties argue that the Petition is procedurally defective because: (1) Allman lacks standing to file the Petition under Section 405 of the Communications Act of 1934, as amended (Act),<sup>11</sup> because he fails to explain how grant of the Applications caused him injury or how rescinding the grants would remedy any such injury;<sup>12</sup> and (2) Allman failed to present his assertions to the Commission prior to grant of the Applications, as required by Section 1.106(b)(1) of the Rules, notwithstanding that Allman had 17 days between his termination on April 10, 2018, and grant of the Applications on April 27, 2018, in which to file an informal objection.<sup>13</sup>

Substantively, the Parties state that, under the terms of the LMA, on March 1, 2018, Allman was hired by Entercom to assist Entercom in its programming responsibilities, while Emmis remained in control of the Stations,<sup>14</sup> but on April 10, 2018, Entercom terminated Allman's employment following Allman's on-air "vulgar and offensive" comments concerning David Hogg, one of the survivors of a high school shooting in 2018 in Parkland, Florida.<sup>15</sup> Finally, the Parties assert that long-standing Commission policy dictates that private contractual disputes, such as here, should be heard in the courts and not adjudicated by the Commission.<sup>16</sup>

In his Reply, Allman submits an affidavit in support of his allegations.<sup>17</sup> He also argues that: (1) his injury is directly traceable to the grant of the Applications because the grant creates a presumption in his civil court action that the Parties' conduct was "proper"; (2) by terminating him, Entercom exerted *de facto* control over station personnel; (3) Section 14 of the APA and Paragraph 9 of the LMA establish an unauthorized transfer of control of the Stations to Entercom in violation of Section 73.3555; and (4) Emmis's Director of Engineering and Director of Finance/Human Resources both left the Stations on March 31, 2018, before Allman was terminated, thus negating the Parties' assertion that Emmis retained ultimate control of the Stations.<sup>18</sup>

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<sup>10</sup> *Id.* at 6. To the extent Allman argues that this transaction violates the local radio ownership rules set forth in 47 CFR § 73.3555(a), the processing staff correctly found that Entercom's ownership of the Stations complied with those provisions. Any such allegation will not be further considered.

<sup>11</sup> 47 U.S.C. § 405.

<sup>12</sup> Opposition at 3.

<sup>13</sup> *Id.* at 3-4; *see also* 47 CFR § 1.106(b)(1). The Parties also argue that the Petition fails under the analytic framework provided in supporting Section 309(d) of the Act because, besides lacking the required affidavit of a person with personal knowledge of the situation, the Petition lacks specific allegations of fact sufficient to show that grant of the Applications would be *prima facie* inconsistent with the public interest. Opposition at 5.

<sup>14</sup> *Id.* at 6-7. *See also* APA at Sections 14.1 and 14.2; LMA at para. 9.

<sup>15</sup> Opposition at 2.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *See* Reply at Attachment. We note that despite the Parties' claims, the filing of an affidavit by Allman is not required, as the Petition here is not a petition to deny.

<sup>18</sup> *Id.* at 2-7.

**Discussion. Procedural Issue.** Section 405(a) of the Act states that any party to an order, decision, report, or action, or any other person aggrieved or whose interests are adversely affected, may petition for reconsideration.<sup>19</sup> Because Allman did not participate prior to grant of the Applications, he is not a party to this proceeding. Therefore, in order to show standing to seek reconsideration, a petitioner who is not a party to the proceeding must: (1) state with particularity the manner in which its interests are adversely affected by the action taken, and (2) show good reason why it was not possible to participate in the earlier stages of the proceeding.<sup>20</sup> Allman fails on both counts. First, although the Commission has accepted petitions for reconsideration when the grant of an application occurred shortly after the application was placed on public notice, finding that such expedient grant effectively precluded participation during the initial consideration of an application,<sup>21</sup> there were 17 days between Allman's termination and the grant of the Applications. Allman makes no effort to explain why he did not initially file an informal objection or petition to deny. Additionally, Allman fails to provide the requisite particularized explanation of how the assignment of Emmis's station licenses to Entercom would result in any direct injury to him that would be redressable by rescinding the assignment grants. We will therefore dismiss the Petition.

Assuming *arguendo* that Allman had standing to file the Petition, we would still be unable to provide the relief requested, namely, rescinding the grant of the Applications. The Commission has long held that it is not the proper forum for the resolution of private contractual disputes and that any redress should be sought in a local court of competent jurisdiction.<sup>22</sup> In fact, Allman has already sought resolution of his dispute with the Parties concerning Allman's termination in a Missouri state court. Allman has not provided evidence of an injunction or a stay issued by any court against the transaction, and in the absence of such a court order, the Commission has routinely acted favorably on license assignment applications pending resolution of private disputes such as those at issue here.<sup>23</sup> We note, however, that Commission grant of an assignment application merely finds that the Parties are qualified under, and the proposed transaction does not violate, the Act, the Rules or Commission policies. As such,

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<sup>19</sup> 47 U.S.C. § 405(a).

<sup>20</sup> 47 CFR § 1.106(b)(1). To determine if a party's interests have been adversely affected, the Commission frequently relies upon a three-pronged standing test under which a party must establish: (1) a distinct and palpable injury-in-fact that is (2) traceable to the respondent's conduct and (3) redressable by the relief requested. *See, e.g., Lewis J. Paper, Esq., Anne Goodwin Crump, Esq., Larry Perry, Esq.*, Letter Order, 29 FCC Rcd 1905, 1908 (MB 2014).

<sup>21</sup> *See Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816, 2816, para. 3 (1989) (standing to file a petition for reconsideration found when application granted four days after public notice issued); *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854-55, para. 9 (1997) (standing to file a petition for reconsideration found when application granted five days after acceptance).

<sup>22</sup> *See, e.g., Cope Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 14564, 14567, para. 10 (1998) (private contractual matters are most appropriately considered by state courts, not the Commission); *see also John F. Runner, Receiver*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976) (local court of competent jurisdiction, not the FCC, is the proper forum to resolve private disputes); *Listener's Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987).

<sup>23</sup> *See, e.g., H. Edward Dillon, Receiver*, Memorandum Opinion and Order, 42 FCC 2d 203, 204, para. 6 (1973) (Commission will not delay action on an involuntary assignment application where state appellate court refused to grant stay of receiver's appointment and specifically authorized the receiver to close the sale).

it is permissive only and does not prejudice any relief to which Allman may ultimately be entitled in the state court proceeding.<sup>24</sup>

Regarding Allman's claim that his termination by Entercom evidences Emmis's lack of ultimate control over the Stations "in violation of Section 73.3555 of the Rules," we disagree. It appears from the record that, at the time of his termination, Allman was a contract employee of Entercom, not Emmis, hired under the terms of the APA and LMA.<sup>25</sup> The Commission long ago recognized that an LMA broker such as Entercom is entitled to employ its own personnel at the brokered station, as long as such employees are subject to the ultimate control of the station licensee.<sup>26</sup> Accordingly, his termination by Entercom does not evidence a premature transfer of control.

Finally, we disagree with Allman's contention that Emmis' Director of Engineering and Director of Finance/Human Resources both left the Stations on March 31, 2018, before Allman was terminated and that Emmis had thus ceded control of the Stations to Entercom. Allman acknowledges,<sup>27</sup> and the Applications state, that the Stations' Senior Vice President and General Manager remained an Emmis employee on site and was to remain in control of station programming, personnel, and finances until the transaction was approved and consummated.<sup>28</sup>

**Conclusion/Actions.** Accordingly, in light of the above discussion, IT IS ORDERED, that the May 30, 2018, Petition for Reconsideration filed by James Allman, IS DISMISSED.

Sincerely,



Albert Shuldiner  
Chief, Audio Division  
Media Bureau

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<sup>24</sup> See *Geraldine R. Miller and George R. Borsari, Jr., Esq.*, Letter Order, 24 FCC Rcd 11814, 11815 (MB 2009).

<sup>25</sup> See APA at Section 14.1 ("In the case of Contract Employees, Sellers [Emmis] shall terminate employment . . . and such employment termination shall be deemed effective as of Buyers' [Entercom] assumption of such . . . Employment Agreements . . .").

<sup>26</sup> See *WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8143, para. 15 (1995) (recognizing necessity for time broker's staff to become involved with licensee's facilities); *Michael R. Birdsill*, Letter Order, 7 FCC Rcd 7891 (MMB 1992) (sharing of staff between brokered station and broker permitted); *Malara Broadcast Group of Duluth Licensee, LLC*, Letter Order, 19 FCC Rcd 24070, 24075 (MB 2004) (to the extent that broker will provide employees to carry out its shared services agreement, this is not inconsistent with Commission policy regarding such arrangements).

<sup>27</sup> See Reply at 8.

<sup>28</sup> See LMA at para. 6(a); Applications, April 20, 2018, amendment, at Exh. 1.