



Federal Communications Commission  
Washington, D.C. 20554

September 5, 2007

**DA 07-3836**

*In Reply Refer to:*

1800B3-KD

Released: September 5, 2007

Mr. David Edward Smith  
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Washington, D.C. 20018-0577

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Wiley Rein LLP  
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In re: WIBC(AM), Indianapolis, IN  
Facility ID No. 19521  
Emmis Radio License, LLC  
File No. BR-20040401AOH

WENS(FM), Shelbyville, IN  
Facility ID No. 19522  
Emmis Radio License, LLC  
File No. BR-20040401ARD

WYXB(FM), Indianapolis, IN  
Facility ID No. 51432  
Emmis Radio License, LLC  
File No. BR-20040401AOL

WWVR(FM), West Terre Haute, IN  
Facility ID No. 68824  
Emmis Radio License, LLC  
File No. BR-20040401AJO

WTHI-FM, Terre Haute, IN  
Facility ID No. 70652  
Emmis Radio License, LLC  
File No. BR-20040401AJH

**Applications for Renewal of Licenses**

**Informal Objection**

Dear Messrs. Smith and Fiorini:

We have before us the referenced applications (the "Applications") of Emmis Radio License, LLC (the "Licensee") for renewal of license for the following radio stations: WIBC(AM), Indianapolis, Indiana; WENS(FM), Shelbyville, Indiana; WYXB(FM), Indianapolis, Indiana; WWVR(FM), West Terre Haute, Indiana; and WTHI-FM, Terre Haute, Indiana (collectively, the "Stations"). Also on file

are: (1) an Informal Objection<sup>1</sup> filed by David Edward Smith (“Smith”) on July 23, 2004 (the “Objection”), and (2) Licensee’s Opposition, filed on August 25, 2004 (the “Opposition”). Smith argues that the Applications should be denied because: (1) Licensee has engaged in a pattern of willfully broadcasting indecent language, and (2) Licensee has abused the Commission’s processes by allegedly supporting a “SLAPP” lawsuit filed against Smith by one of its Station announcers.<sup>2</sup> For the reasons set forth below, we deny the Objection and grant the Applications.

**Discussion.** Both petitions to deny and informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (the “Act”), provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(k) of the Act,<sup>3</sup> which governs our evaluation of an application for license renewal. Specifically, Section 309(k)(1) provides that we are to grant the renewal application if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse.<sup>4</sup> If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”<sup>5</sup>

*Indecency Claim.* Smith argues that the Applications should be denied because Licensee has engaged in a pattern of willfully broadcasting indecent language.<sup>6</sup> To support this assertion, Smith claims that he “filed over 60 [indecent] complaints with the FCC” (the “Complaints”) regarding a program broadcast on the Stations called, “Mancow’s Morning Madness” (the “Program”).<sup>7</sup> He further points to several Notices of Apparent Liability for Forfeiture and Forfeiture Orders (collectively, the “Orders”) released between 2002 and April of 2004, in which the Commission determined that portions of the Program contained indecent material.<sup>8</sup>

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<sup>1</sup> While Smith also objects to the license renewal of WNOU(FM), Indianapolis, Indiana, and WKQK(FM), Chicago, Illinois, we decline to act on those applications at this time.

<sup>2</sup> A “SLAPP” suit is a “meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.” 1 Am. Jur. 2d Action § 38 (2007). The acronym stands for “Strategic Lawsuit Against Public Participation.” *Id.*

<sup>3</sup> See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 note 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

<sup>4</sup> 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

<sup>5</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

<sup>6</sup> Objection at 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Emmis Radio License Corp.*, Forfeiture Order, 17 FCC Rcd 21697 (EB 2002), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 2710 (EB 2004), *rescinded*, Order, 19 FCC Rcd 16003 (2004); *Emmis Radio License Corp.*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 11990 (EB 2002), *recon. denied*, Forfeiture Order, 19 FCC Rcd 2701 (EB 2004), *rescinded*, 19 FCC Rcd 16003 (2004); *Emmis Radio License Corp.*, Notice of

The Orders and the Complaints are barred from consideration by the terms of a consent decree (the "Consent Decree") entered into by the Commission and Licensee's parent corporation, Emmis Communications Corporation ("Emmis").<sup>9</sup> By the terms of the Consent Decree, Emmis agreed to undertake certain compliance measures and to pay the United States Treasury the sum of \$300,000 in consideration for the Commission rescinding, vacating and canceling certain forfeiture orders issued against Emmis-owned broadcast licensees, terminating certain inquiries, and dismissing, with prejudice, pending indecency complaints against those licensees. In addition, the Commission agreed to refrain from taking any action against Emmis or any future application -- including renewal applications -- to which Emmis is a party, based in whole or in part on "any similar complaints alleging violation by any [station operated by Emmis] of the Indecency Laws with respect to any broadcast occurring prior to the Effective Date."<sup>10</sup> The Effective Date of the Consent Decree is August 12, 2004, the date of its public release.<sup>11</sup>

The broadcasts that are the subject of the Orders and of Smith's Objection were aired before the Effective Date of the Consent Decree. Accordingly, Smith's indecency allegations are barred from consideration in connection with the Applications.

*Abuse of Process Claim.* Smith next claims that Licensee has abused the Commission process by allegedly condoning a "SLAPP" lawsuit filed against Smith by Erich "Mancow" Muller, the Program's host, in retaliation against Smith for filing the Complaints with the Commission.<sup>12</sup> Specifically, Smith alleges that Licensee has violated numerous federal laws by interfering with his right to participate in the Commission renewal process, and states that the lawsuit was filed "in order to corruptly harass, intimidate and frighten potential witnesses to violations of [the Commission's indecency rules]."<sup>13</sup> In response, Licensee claims that the Commission already considered and dismissed Smith's allegations in the Order adopting the Consent Decree.<sup>14</sup>

The Commission does not regulate the non-broadcast activities of station personnel or announcers.<sup>15</sup> As noted by Licensee, the Commission has already considered and rejected Smith's abuse of process arguments in the Order adopting the Consent Decree, finding that Emmis had no involvement in the lawsuit, based on a sworn declaration submitted by Emmis.<sup>16</sup> Accordingly, we will not consider this issue further.

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Apparent Liability for Forfeiture, 17 FCC Rcd 5263 (EB 2002); *Emmis FM License Corp. of Chicago*, Forfeiture Order, 17 FCC Rcd 493 (EB 2002), *rev. denied*, Memorandum Opinion and Order, 19 FCC Rcd 6452 (2004), *rescinded*, Order, 19 FCC Rcd 16003 (2004); *Emmis FM License*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 7829 (EB 2001).

<sup>9</sup> *Emmis Communications Corp.*, Order, 19 FCC Rcd 16003 (2004), *recon. denied*, Order on Reconsideration, 21 FCC Rcd 12219 (2006).

<sup>10</sup> Consent Decree, ¶ 8.

<sup>11</sup> Consent Decree, ¶ 2(h).

<sup>12</sup> Objection at 2-3.

<sup>13</sup> Objection at 4.

<sup>14</sup> Opposition at 2.

<sup>15</sup> See *Eagle Radio, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 1294, 1294-95 (1994); *Dale A. Owens*, Memorandum Opinion and Order, 54 FCC 2d 375, 378-79 (1975).

<sup>16</sup> In dismissing Smith's Petition for Reconsideration of the Enforcement Bureau's June 16, 2004, letter disposing of certain of his indecency complaints against Emmis and addressing Smith's request that the Commission deny the

**Conclusion/Actions.** For the foregoing reasons, we deny the Objection. We have evaluated the above-referenced renewal applications pursuant to Section 309(k) of the Act,<sup>17</sup> and we find that Stations have served the public interest, convenience, and necessity during the subject license term. Moreover, we find that there have been no serious violations of the Act or the Rules involving Stations or violations by Licensee of the Act or the Rules which, taken together, would constitute a pattern of abuse. In light of the foregoing, we will grant the Applications.

Accordingly, IT IS ORDERED that the Informal Objection filed by David Edward Smith is DENIED.

IT IS FURTHER ORDERED that the Applications of Emmis Radio License, LLC, for renewal of its license for the radio stations referenced above, ARE GRANTED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Emmis Radio License, LLC

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renewal application for WKQX(FM), the Order adopting the Consent Decree states: “[W]e note that the lawsuit was dismissed by the Court, with prejudice, on July 26, 2004. Moreover . . . Emmis provides the Declaration of Charles DuCoty, General Manager of [WKQX(FM)], who represents that Emmis had no role, and provided no encouragement or assistance to Mr. Muller, in connection with the lawsuit.” *Emmis Communications Corp.*, Order, 19 FCC Rcd at 16004.

<sup>17</sup> 47 U.S.C. § 309(k).