



Federal Communications Commission  
Washington, D.C. 20554

October 22, 2010

*In Reply Refer to:*  
1800B3-MFW

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In re: WKQX(FM), Chicago, IL  
Facility ID No. 19525  
File No. BRH-200408021AQH

Application for License Renewal

Gentlemen:

This letter concerns the August 21, 2004, application (the "Application") of Emmis Radio License Corporation ("Emmis" or the "Licensee") to renew the license of Station WKQX(FM), Chicago, Illinois (the "Station"). On November 1, 2004, David Edward Smith and others (the "Petitioners")<sup>1</sup> filed a Petition to Deny the Application (the "Petition").<sup>2</sup> For the reasons set forth below, we deny the Petition.

*Background.* On August 2, 2004, Emmis filed the Application to renew the Station's license. In the Petition, Petitioners allege that Emmis had engaged in a pattern of willfully broadcasting indecent language,<sup>3</sup> and that Emmis had abused the Commission's processes by allegedly supporting a "SLAPP" lawsuit filed against Smith by one of its Station announcers.<sup>4</sup>

*Discussion.* Both petitions to deny and informal objections to license renewal applications 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>5</sup> Specifically,

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<sup>1</sup> Peter Labarbera, Kathy Valente, Illinois Family Institute, and Illinois Chapter of Concerned Women for America.

<sup>2</sup> Emmis filed an Opposition on December 1, 2004, to which the Petitioners replied on December 21, 2004.

<sup>3</sup> Petitioners claim that Smith "filed over 60 [indecent] complaints with the FCC" (the "Complaints") regarding a program broadcast on the Stations called, "Mancow's Morning Madness" (the "Program"). He further pointed to several Notices of Apparent Liability for Forfeiture and Forfeiture Orders released between March of 2000 and March of 2001 and that "Emmis serially violated 18 U.S.C. § 1464 at least nineteen times between July 16, 2002 and November 13, 2003. Petition at 2-3.

<sup>4</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>5</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

Section 309(k)(1) provides that the Commission shall grant a 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>6</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>7</sup>

Petitioners’ arguments have been addressed and rejected twice previously by the Media Bureau (“Bureau”), in connection with the renewal of five Emmis stations in Indiana.<sup>8</sup> The complaints referenced by Petitioners are barred from consideration here by the terms of an August 10, 2004, Consent Decree in settlement of Emmis’ various indecency complaints.<sup>9</sup> Additionally, the Bureau rejected Smith’s previous claim based on the SLAPP suit. As we have noted previously, the Commission does not regulate the non-broadcast activities of station personnel or announcers. Moreover, Petitioners have failed to rebut a sworn declaration submitted by Emmis principals stating that Emmis had no involvement in the lawsuit.<sup>10</sup>

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contain adequate and specific factual allegations sufficient to warrant the relief requested).

<sup>6</sup> 47 U.S.C. § 309(k)(1).

<sup>7</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

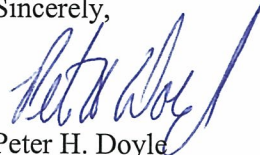
<sup>8</sup> See *Letter to Mr. David Edward Smith and John E. Fiorini, Esq.*, 22 FCC Rcd 16637 (MB 2007) (“*Staff Decision*”), *recon. denied*, *Letter to Dennis J. Kelly, Esq. and John E. Fiorini, Esq.*, 24 FCC Rcd 369 (MB 2009) (“*Reconsideration Decision*”), *Application for Review pending*.

<sup>9</sup> See *Staff Decision*, 22 FCC Rcd at 16639; *Reconsideration Decision*, 24 FCC Rcd at 371, citing *Emmis Communications Corp.*, Order, 19 FCC Rcd 16003, 16004 (2004) (the “*Consent Decree*”). The *Consent Decree* was entered into by the Commission and Emmis’s parent corporation, Emmis Communications Corporation (“Emmis CC”). By the terms of the *Consent Decree*, Emmis CC 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 CC-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 CC or any future application -- including renewal applications -- to which Emmis CC is a party, based in whole or in part on “any similar complaints alleging violation by any [station operated by Emmis CC] of the Indecency Laws with respect to any broadcast occurring prior to the Effective Date.” The Effective Date of the *Consent Decree* was August 12, 2004, the date of its public release. The *Consent Decree* was subsequently upheld by the Court of Appeals for the District of Columbia Circuit as a “nonreviewable exercise of agency discretion.” *David Edward Smith et al. v. FCC*, No 06-1381, Order (D.C. Cir. Mar. 29, 2007); *Parents Television Council v. FCC*, No. 04-1263, Order, 2004 WL 2931357 (D.C. Cir. Dec. 17, 2004).

<sup>10</sup> *Staff Staff Decision*, 22 FCC Rcd at 16639; *Reconsideration Decision*, 24 FCC Rcd at 371-2. 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 [CC] 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.” *Consent Decree*, 19 FCC Rcd at 16004 n.7.

*Conclusion/Actions.* For the foregoing reasons, we find that Petitioners have failed to raise a substantial and material question of fact that grant of the Application would be *prima facie* inconsistent with Section 309(k) of the Act. Accordingly, the November 1, 2004, Petition to Deny filed by David Edward Smith, Peter Labarbera, Kathy Valente, Illinois Family Institute, and Illinois Chapter of Concerned Women for America IS DENIED.

Sincerely,

A handwritten signature in blue ink, appearing to read "Peter H. Doyle", written over a horizontal line.

Peter H. Doyle  
Chief, Audio Division  
Media Bureau