



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer To:
1800B3-MPM

Dennis J. Kelly, Esq.,
P.O. Box 41177
Washington, D.C. 20018-0577

Steven A. Lerman, Esq.
Lerman Senter PLLC
2000 K Street, NW, Suite 600
Washington, DC 20006-1809

In re: CBS Radio East Inc.
WXYT-FM, Detroit, Michigan¹
Facility ID No. 9618
File Nos. BRH-20040601BHZ,
BRH-20120601ASW

Petition to Deny

Dear Counsel:

This letter refers to: 1) the above-referenced applications (“2004 Application” and 2012 Applications,” respectively) filed by CBS Radio East, Inc. (“CBS Radio”),² to renew the license of station WXYT-FM, Detroit, Michigan (“Station”); and 2) the September 1, 2004 petition to deny (“Petition”) the 2004 Application jointly filed by Right to Decency, Inc. and American Decency Association (collectively, “Petitioners”).³ For the reasons set forth below, we deny the Petition and grant the 2004 and 2012 Applications.

Background. Petitioners argue first that the Application should be denied because the Station has violated Section 1464 of the United States criminal code⁴ and Section 73.3999 of the Commission’s Rules (“Rules”),⁵ which ban the broadcast of obscene and/or indecent content.⁶ Specifically, the Petitioners cite fourteen broadcasts that “demonstrate multiple violations of Section 1464” due to the broadcasts’ “lewd” and “vulgar” content.⁷ The majority of the cited broadcasts are segments from “The

¹ WXYT-FM operated under the call sign WKRK-FM until October 3, 2007. For administrative convenience, we will use the Station’s current call sign throughout this document.

² The 2004 Application was filed by then licensee Infinity Broadcasting East, Inc. (“Infinity”). Infinity was a subsidiary of Viacom Inc. (“Viacom”). In 2005, Viacom reorganized its subsidiaries, and Infinity became a subsidiary of CBS Corporation. See File No. BTC-20051011AJK, granted October 11, 2005. Infinity Broadcasting East, Inc., was subsequently renamed CBS Radio East, Inc. Again for administrative convenience, we will use the Station’s current licensee throughout this document.

³ CBS Radio filed a Consent Motion for Extension of Time on September 23, 2004, and an opposition to the Petition (“Opposition”) on November 5, 2004. Petitioners filed a reply to the Opposition (“Reply”) on January 10, 2005.

⁴ 18 U.S.C. § 1464.

⁵ 47 C.F.R. § 73.3999.

⁶ Petition at 4-5; 13-15.

⁷ *Id.* at 4-7; Exhibits A-O (providing transcripts the alleged indecent broadcasts).

Howard Stern Show.”⁸ The Petitioners point out that segments from “The Howard Stern Show” have led to CBS Radio licensees being fined for violating of Section 1464, and they argue that these new violations are no different, or in some instances worse, than previous violations.⁹ The Petitioners claim that there are “no First Amendment principles at stake here,” as the operative question is not about free speech, but rather whether the “public interest, convenience, and necessity would be served by the grant of the Application.”¹⁰ The Petitioners also contend that the Station is in violation of its September 1, 1995 Settlement Agreement (“1995 Settlement Agreement”) with the FCC.¹¹ Finally, the Petitioners argue that the Commission has unfairly “coddl[ed]” CBS Radio licensees by allowing them to continue broadcasting, especially when compared to how the Commission has treated “minority licensees” for violating the Rules.¹²

In its Opposition, CBS Radio first argues that the Petition does not satisfy the standard set forth in Section 309(d)(1) of the Communications Act of 1934, as amended (“Act”),¹³ by which petitions to deny are evaluated, because the sworn declarations state that the allegations are true only to the best of the affiant’s knowledge.¹⁴ CBS Radio next argues that all but two of Petitioner’s claims against CBS Radio are based on the actions of other stations licensed to CBS Radio and not on the actions of the Station, and that these allegations are “irrelevant” to these proceedings.¹⁵ CBS Radio also states that the Petitioners have failed to provide proof that much of the allegedly indecent content cited was actually aired by the Station.¹⁶ For the two programs which did air on the Station, instances cited that originated from the Station, CBS Radio argues that the content was not indecent and, arguendo, that if they were indecent, these broadcasts represent such a small amount of the Station’s overall broadcast that the relief sought is “extreme” and “severe.”¹⁷ Finally, CBS Radio asserts that the First Amendment concerns inherent in this content-based appeal from the Petitioners warrant a “cautious” and “restrained” approach from the Bureau, and that the grant of the Petition would have an industry-wide “chilling effect” antithetical to the First Amendment.¹⁸

Between the filing of the Opposition and the Petitioner’s Reply, the Commission entered into a Consent Decree with Viacom and its network and broadcast licensee subsidiaries and affiliates, including CBS Radio.¹⁹ In adopting the *Consent Decree*, the Commission: (1) rescinded, vacated, and cancelled a

⁸ *Id.* at 4-6; Exhibits A-N.

⁹ *Id.* at 9-10; 13-15.

¹⁰ *Id.* at 15-16.

¹¹ *Id.* at 16-18. The 1995 Settlement Agreement is attached as Exhibit U of the Petition.

¹² *Id.* at 19-22.

¹³ 47 U.S.C. § 309(d)(1).

¹⁴ Opposition at 1-3. Both signatories to the declarations provided declare that the information contained in the Petitioner is true “to the best of my knowledge.” See Petition at Exhibit V; W.

¹⁵ *Id.* at 3-7.

¹⁶ *Id.* at 4-5.

¹⁷ *Id.* at 6-11.

¹⁸ *Id.* at 12-13.

¹⁹ *Viacom, Inc., et al.*, Order, 19 FCC Rcd 23100 (2004) (“*Consent Decree*”).

Forfeiture Order issued to WKRK-FM,²⁰ and a Notice of Apparent Liability for Forfeiture issued to WKRK-FM;²¹ (2) terminated all pending Enforcement Bureau investigations regarding possible violations of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 by Viacom, and its subsidiaries and affiliates; and (3) dismissed with prejudice all third party complaints alleging violations of those provisions pending as of the November 23, 2004, date of the Consent Decree.²² The Consent Decree covered the allegedly indecent broadcasts cited in the Petition.

In the Reply, the Petitioners first argue that there are no procedural defects to the Petition, stating that the credibility of sworn declarations should not be questioned.²³ The Petitioners also argue that, contrary to CBS Radio's assertions, the Bureau can consider the actions of parties outside the station at issue when considering whether the licensee meets the requisite character qualifications.²⁴ The Petitioners then argue that any negotiations between Viacom and the Commission that led to the *Consent Decree* would have been illegal *ex parte* contacts.²⁵ Finally, the Petitioners argue that the Commission lacks the authority to bind itself to the terms of the *Consent Decree*, stating that "the Commission has no authority to sell a renewal of license to a party such as Viacom, nor does it have the any authority to sell a party a finding of basic character qualifications."²⁶

Discussion. Procedural Issues. Section 309(d)(1) of the Act, and Section 73.3584 of the Commission's Rules, require that petitions to deny be supported by affidavits or declarations under penalty of perjury from persons with personal knowledge of the facts set forth in the petition.²⁷ For national organizations such as the Petitioners to establish standing, we "require an affidavit by a person entitled to standing, indicating that the organization did, in fact, represent a resident or residents of the station's service area and that the petition is filed on their behalf."²⁸ The declarations provided by Right to Decency and American Decency Association—standing alone or in combination—are inadequate to establish standing.

The declaration provided by Right to Decency was signed by Mary Ellen Gavin. Although Gavin does state that she lives within the Station's primary service contour and is a listener of the Station,²⁹ we nevertheless find that the declaration is insufficient, as her assertion that the facts are true and correct "to the best of my knowledge" is inadequate.³⁰ We find the declaration filed by American Decency

²⁰ *Infinity Broadcasting Operations, Inc.*, 18 FCC Rcd 26360 (2003), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 4216 (2004), *further recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 20156 (2004).

²¹ *Infinity Broadcasting Operations, Inc.*, 18 FCC Rcd 6915 (2003).

²² *Order*, 19 FCC Rcd at 23103.

²³ Reply at 1-2.

²⁴ *Id.* at 2-3.

²⁵ *Id.* at 5-6.

²⁶ *Id.* at 6-11.

²⁷ See *Columbia Broadcasting System, Inc.*, 46 FCC 2d 903 (1974) .

²⁸ See *North Alabama Broadcasters, Inc.* ("North Alabama"), 74 FCC2d 347, 348 (1979) (emphasis added) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

²⁹ See *United Church of Christ v. FCC*, 359 F.2d 994 (D.C.Cir.1966).

³⁰ Petition at Exhibit V; see *Ernest T. Sanchez, Esquire*, Letter, 10 FCC 4517, 4518 (1995) (finding an "assertion that the facts [in an affidavit] are true and correct 'to the best of my knowledge, information, and belief' is inadequate").

Association signed by William Johnson for similar reasons.³¹ However, despite the fact that the declarations are facially defective, we will treat Petitioner's pleading as an informal objection pursuant to 47 C.F.R. § 73.3587.³²

Substantive Issues. An informal objection must, pursuant to Section 309(d) of 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,³³ 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 that, taken together, constitute a pattern of abuse.³⁴ 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(d) 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."³⁵

The Commission address the material broadcast by CBS Radio that Petitioners allege to be indecent in the *Consent Decree*. On December 23, 2004, Petitioners filed a Petition for Reconsideration of the *Order*, which the Commission denied on October 17, 2006.³⁶ There were no further appeals and the *Consent Decree* is now a final action. In affirming the *Consent Decree*, the Commission stated in the *Reconsideration Order* stated that:

. . . in entering into the *Consent Decree*, we did not ignore the potential character issues raised by Viacom's apparent indecency violations, as Petitioners suggest. Rather, we fully considered all potential basic qualifications issues raised by Viacom's apparent indecency violations and specifically determined that they did not raise substantial and material questions of fact as to whether Viacom possesses the requisite qualifications necessary to be a Commission licensee. . . . Having already fully considered those matters, we need not reexamine these issues in a different proceeding.³⁷

³¹ Petition at Exhibit W; *see supra* note 12.

³² 47 C.F.R. § 73.3587; *see Community Television of Southern California*, 46 R.R.2d 1103 (1987) (petition to deny properly treated as informal objection where affiant lacked personal knowledge of the fact alleged).

³³ 47 U.S.C. § 309(k). *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh'g denied* (D.C. Cir. Sept. 10, 1993).

³⁴ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described in the text 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).

³⁵ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

³⁶ *See Viacom, Inc., et al.*, Order on Reconsideration, 21 FCC Rcd 12223 (2006) ("*Reconsideration Order*").

³⁷ *Id.*, 21 FCC Rcd at 12227.

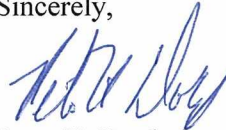
With respect to Objectors' claim that the negotiation of the *Consent Decree* violated the Commission's *ex parte* rules, the Act provides the Commission with "broad discretion" to settle enforcement actions,³⁸ and the Commission has held that such communications for the purpose of resolving settlement issues are exempt from the general prohibition on *ex parte* communications.³⁹

The terms of the *Consent Decree* bar the Bureau from considering the claims set forth in the Petition.⁴⁰ In light of these facts, Petitioners have failed to raise a substantial and material question of fact calling for further inquiry regarding the Application. Moreover, we have evaluated the Application pursuant to Section 309(k) of the Act, and we find neither evidence of serious violations of the Communications Act or the Commission's Rules nor of other violations that, when considered together, evidence a pattern of abuse. Further, we find that the Station served the public interest, convenience, and necessity during the subject license terms. Therefore, we will grant the 2004 Application and the 2012 Application.

Conclusion. Accordingly, pursuant to Section 309(k) of the Communications Act of 1934, as amended, and Sections 0.61 and 0.283 of the Commission's Rules,⁴¹ for the reasons set forth above, the Informal Objection filed by Right to Decency, Inc. and American Decency Association IS DENIED.

IT IS FURTHER ORDERED that the applications for renewal of license for Station WKRK-FM, Detroit, Michigan, (File Nos. BRH-20040601BHZ and BRH-20120601ASW) ARE GRANTED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁸ *Emmis Communication Corporation*, Order on Reconsideration, 21 FCC Rcd 12219, 12221 (2006) (citing *Parents Television Council, Inc. v. FCC*, 2004 WL 2931357 (D.C. Cir. 2004)).

³⁹ See, e.g., *Golden Gulf Coast Broadcasting, Inc., Assignor*, 29 FCC Rcd 2469, 2470 (2014).

⁴⁰ See *Consent Decree*, 19 FCC Rcd at 23106-07, ¶ 10. See also *Emmis Communications Corp.*, Order, 19 FCC Rcd 16003 (2004) ("*Consent Decree*"), *recon denied*, Order on Reconsideration, 21 FCC Rcd 12219, 12221 (2006) (stating that the Commission has "broad discretion" to settle or dismiss enforcement actions, including the ability to foreclose the consideration of certain facts in future proceedings), *aff'd sub nom. David Edward Smith et al. v. FCC*, No. 06-1381, Order (D.C. Cir. Mar. 29, 2007).

⁴¹ 47 U.S.C. § 309(k); 47 C.F.R. §§ 0.61, 0.283.